Supreme Court, U.S.
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No. 01-1235 FEB 22 2002

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In The

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

GEORGE BURNETT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Is the Supreme Court of Ohio bound by rulings on federal constitutional law made by the United States Court of Appeals for the Sixth Circuit?

2) How does the United States Constitution protect a lawfully arrested or convicted individual's interest in intrastate movement?

3) Are government limitations imposed on a lawfully arrested or convicted individual's intrastate movement for the purpose of addressing a compelling government interest subject to rational basis review, the Fourth Amendment proscription against unreasonable seizures or some other form of intermediate judicial scrutiny, or strict judicial scrutiny?

4) Is the temporary civil exclusion of an individual lawfully arrested or convicted of a specified drug crime from a high drug crime neighborhood a criminal penalty within the meaning of the constitutional right to be free from double jeopardy?

LIST OF PARTIES

Petitioner: State of Ohio

Respondent: George Burnett

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, State of Ohio, respectfully prays that a writ of certiorari be issued to review the final judgment of the Supreme Court of Ohio.

OPINIONS BELOW

The decision of the Hamilton County, Ohio, Municipal Court finding Respondent guilty of criminal trespass for violating Chapter 755 Cincinnati Municipal Code, Drug Exclusion Zones, was issued on November 20, 1998. App. 51-54. The opinion of the Ohio Court of Appeals, First District, affirming the decision of the Municipal Court was issued on December 23, 1999. App. 35. The opinion of the Supreme Court of Ohio reversing the decision of the Ohio Court of Appeals was issued on October 17, 2001. App. 1. The entry of the Supreme Court of Ohio denying the Petitioner's motion for reconsideration was issued on December 5, 2001. App. 55.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 to review the entry of the Supreme Court of Ohio denying the Petitioner's motion for reconsideration on December 5, 2001, and the opinion of the Supreme Court of Ohio issued on October 17, 2001.

STATUTORY PROVISIONS INVOLVED

See App. 56-82, for Ordinance No. 229-1996 (the legislation declared unconstitutional by the Supreme Court of Ohio – Cincinnati Municipal Code Chapter 755, Drug Exclusion Zones) and Ordinance No. 304-1998 (a 1998 amendment to Chapter 755).

STATEMENT OF THE CASE

In 1996, confronted with rampant drug crime in a neighborhood ("Over the Rhine") adjacent to the City's central business district and intending to restore a higher quality of life to that neighborhood for residents and businesses, the City Council of the City of Cincinnati enacted Ordinance No. 229-1996, codified as Chapter 755, Cincinnati Municipal Code, Drug Exclusion Zones. The City ordinance authorizes the exclusion of individuals lawfully arrested or convicted of specified drug crimes from the neighborhood for 90 days or one year, respectively. The ordinance provides an administrative appeal and variance procedure.

City Council's legislative findings included the existence of concentrated illegal drug crime in certain areas of the City, recidivism by individuals arrested or convicted of drug crimes, and the success in reducing drug crime of a comparable ordinance in Portland, Oregon. App. 57-59. The Supreme Court of Ohio conceded that the City has a compelling government interest in protecting neighborhoods from rampant drug crime. App. 17-18. This Court has previously held that "[t]he government's

interest in preventing crime by arrestees is both legitimate and compelling." *United States v. Salerno*, 481 U.S. 739, 749, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987).

Respondent George Burnett was arrested on February 7, 1998, in Over the Rhine and charged with possessing drug paraphernalia, a violation of Ohio Revised Code § 2925.14. App. 4, 35-36. Burnett was given notice in writing that he was excluded from Over the Rhine for a period of ninety days. The notice advised Burnett of his right to administratively appeal the notice of exclusion. The notice also advised him that he would be charged with criminal trespass if he violated the terms of the exclusion. Burnett did not appeal the exclusion or seek a variance.

Burnett was subsequently convicted of the drug offense and given a notice of exclusion for a period of one year. *Id.* Burnett did not appeal this exclusion or seek a variance. On June 23, 1998, Burnett was observed in Over the Rhine and he was arrested and charged with criminal trespass in violation of Ohio Revised Code § 2911.21. Burnett pled not guilty to the charge and filed a motion to dismiss on the ground, in part, that Cincinnati Municipal Code Chapter 755 was unconstitutional. His motion to dismiss was denied and, after trial to the court, he was found guilty of criminal trespass.

Burnett appealed his conviction to the Ohio Court of Appeals, First Appellate District. The Court of Appeals affirmed his conviction, ruling that Burnett's interest in movement was not unconstitutionally limited by the City's ordinance. App. 40-42. Burnett appealed to the Supreme Court of Ohio. In a decision dated October 17,

2001, the Supreme Court of Ohio reversed and declared Cincinnati Municipal Code Chapter 755 unconstitutional. The Supreme Court of Ohio held that it was not bound by federal court rulings on issues of constitutional law (except rulings of this Court), that Burnett had a fundamental constitutional right to freedom of movement, and that a limitation on that freedom was subject to strict judicial scrutiny. App. 12-21. The Supreme Court of Ohio also ruled without analysis that the City's temporary exclusion of Burnett from Over the Rhine was punitive. App. 21-23.

The City timely filed a motion for reconsideration with the Supreme Court of Ohio. The City argued that the Supreme Court of Ohio had erroneously ignored a recent decision of the United States Court of Appeals for the Sixth Circuit holding that the United States Constitution did not provide a fundamental right to intrastate movement and holding that a limitation on intrastate movement was subject to rational basis scrutiny. The City also demonstrated that application of this Court's test for determining whether a government act is punitive under the double jeopardy clause easily leads to the conclusion that the City's temporary exclusion of an individual lawfully arrested or convicted of a specified drug crime from a high drug crime neighborhood is not punitive.

Moreover, the Supreme Court of Ohio had erroneously assumed that the City had not appealed *Johnson, et al. v. City of Cincinnati*, 119 F. Supp. 2d 735 (S.D. Ohio 2000), to the United States Court of Appeals for the Sixth Circuit (the Supreme Court of Ohio prejudicially assumed that "[t]he *Johnson* decision has not been appealed to the United States Court of Appeals for the Sixth Circuit;"

App. 5). The Supreme Court of Ohio denied the City's motion for reconsideration on December 5, 2001. App. 55.

In fact, the City had appealed the *Johnson* case to the United States Court of Appeals for the Sixth Circuit on November 16, 2000, briefs had been submitted early in 2001, and the case has since been argued and is pending for decision. Case No. 00-4477, United States Court of Appeals for the Sixth Circuit. The *Johnson* case is a civil challenge in federal court by two excluded individuals to Cincinnati Municipal Code Chapter 755. The federal district court committed the same error as the Supreme Court of Ohio, first declaring that a lawfully arrested or convicted individual's interest in intrastate movement is a fundamental right protected by substantive due process principles and then applying strict judicial scrutiny to the ordinance. The federal district court also found that the temporary exclusion from a drug-infested neighborhood authorized by the City ordinance was punitive and violated federal double jeopardy principles.

At oral argument in the *Johnson* appeal, the Chief Judge of the Sixth Circuit suggested that the Court of Appeals may wait for this Court's determination whether to grant the City's Petition for Writ of Certiorari in the case at bar, thereby deferring to this Court if the Petition is granted. Conversely, however, the Chief Judge also suggested that the United States Court of Appeals for the Sixth Circuit might declare the case moot and deny the City a federal appellate forum for review of the federal constitutional issues if this Court denies this Petition.

REASONS FOR GRANTING THE WRIT

I. THE SUPREME COURT OF OHIO ESTABLISHED AN UNCONSTITUTIONAL PRECEDENT, CONTRARY TO PRINCIPLES OF FEDERALISM AND COMITY, BY HOLDING THAT OHIO STATE COURTS WERE BOUND ONLY BY THE UNITED STATES SUPREME COURT ON ISSUES OF FEDERAL CONSTITUTIONAL LAW AND WERE NOT BOUND BY THE FEDERAL CONSTITUTIONAL LAW HOLDINGS OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

State courts must interpret the United States Constitution by reference to federal law to satisfy the mandate of the Supremacy Clause and achieve the benefits of federalism and comity. If not, jurisprudential conflicts like the one now existing in Ohio will be more, rather than less, likely. Now, in Ohio, the United States Court of Appeals for the Sixth Circuit has defined an individual's interest in intrastate movement and the related standard of judicial review one way, and the Supreme Court of Ohio has defined the interest and the related standard of judicial review in a very different and conflicting way.

The Supreme Court of Ohio addressed this issue of federalism and stated that "[t]he United States Supreme Court has not . . . indicated whether state courts are bound by inferior federal court decisions," recognized that decisions of the Supreme Court of the United States "suggest that inferior federal court decisions bind state courts," identified that "the federal courts of appeals are split on the issue," but ultimately concluded that "we are

not bound by rulings on federal authority or constitutional law made by a federal court other than the United States Supreme Court." App. 6-9.

At least two decisions of this Court support the principle that state courts are bound by lower federal court interpretations of the United States Constitution. *South Railway Co. v. Gray*, 241 U.S. 333, 338-39, 36 S.Ct. 558, 60 L.Ed. 1030 (1916); *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). The Supreme Court of Ohio held that it was not bound by rulings on issues of federal constitutional law issued by the United States Court of Appeals for the Sixth Circuit. Consequently, as described below, in Ohio there are conflicting rulings on a matter of federal constitutional law issued by the state and federal judiciaries. Individuals and governments do not know which ruling controls.

II. THE SUPREME COURT OF OHIO, THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, AND OTHER FEDERAL CIRCUIT COURTS HAVE ALL ISSUED CONFLICTING RULINGS ON THE NATURE OF AN INDIVIDUAL'S INTEREST IN INTRASTATE MOVEMENT AND THE APPROPRIATE STANDARD OF JUDICIAL REVIEW FOR GOVERNMENT LIMITATIONS ON THAT INTEREST; THIS COURT HAS INDICATED THAT INTENTIONAL LIMITATIONS ON MOVEMENT ARE GOVERNED BY THE FOURTH AMENDMENT; FURTHERMORE, A LAWFULLY ARRESTED OR CONVICTED INDIVIDUAL HAS MORE LIMITED MOVEMENT RIGHTS THAN INDIVIDUALS WHO HAVE NOT BEEN LAWFULLY ARRESTED OR CONVICTED

In the case at bar, unlike the rulings of the different federal courts of appeals discussed below, the Supreme

Court of Ohio established an individual's interest in intrastate movement as part of a "constitutional guarantee of the right of travel which is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution," extended that guarantee to individuals who had been lawfully arrested or convicted of specified drug crimes, and applied strict judicial scrutiny to the challenged City limitation on intrastate movement. App. 12-21.

By contrast, just last year the United States Court of Appeals for the Sixth Circuit held that intrastate movement is not part of the right of travel since "that right is essentially a right of interstate travel." *Thompson v. Ashe, et al.*, 250 F.3d 399, 406 (6th Cir. 2001). The United States Court of Appeals for the Sixth Circuit applied rational basis review to the government restriction on intrastate movement considered in *Thompson v. Ashe, et al.* At least one federal district court has already followed the holding of *Thompson v. Ashe, et al.* and expressly disregarded the holding of *Johnson, et al. v. City of Cincinnati, supra. See, Doe v. City of Lafayette, Indiana,* 160 F. Supp. 2d 996 (N.D. Indiana 2001).

The United States Court of Appeals for the First Circuit has a different opinion about the nature of intrastate movement and the proper level of judicial review. In *Nieves, et al. v. McSweeney, et al.*, 241 F.3d 46 (1st Cir. 2001), the Court of Appeals ruled that when the liberty of an individual is restrained in a significant way by a show of authority, the individual is seized within the purview of the Fourth Amendment. The Court of Appeals indicated that "definitive restrictions on the right to travel" would be governed by the Fourth Amendment. *Id.*, p. 57.

This is the position advocated by the City of Cincinnati in *Johnson, et al. v. City of Cincinnati, supra,* 119 F. Supp. 2d at 739-741, and it is the position advocated by the City before this Court.

This Court also supports the position that Fourth Amendment principles govern limitations on the movement of lawfully arrested or convicted individuals. This Court established that an intentionally applied government limitation on the movement of individuals warrants Fourth Amendment review. *Brower v. County of Inyo,* 489 U.S. 593, 599, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989) (holding that the government's intentional termination of an individual's movement by means of a roadblock constituted a Fourth Amendment seizure); *County of Sacramento v. Lewis,* 523 U.S. 833, 844, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (holding that neither the Fourth Amendment nor substantive due process principles governed *unintentiona*l harm to an individual during a high-speed automobile chase). Application of the Fourth Amendment balancing standard of review is supported by *United States v. James Daniel Good Real Property, et al.,* 510 U.S. 43, 50, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993); *Albright v. Oliver,* 510 U.S. 266, 274, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994); *United States v. Salerno,* 481 U.S. 739, 748, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest").

The United States Court of Appeals for the Third Circuit has yet a different opinion. In *Lutz v. City of York, Pennsylvania,* 899 F.2d 255, 267 (3rd Cir. 1990), the Court

of Appeals for the Third Circuit held that "no constitutional text other than the Due Process Clauses could possibly create a right of localized intrastate movement. . . . " The Court then concluded that the interest in movement is "implicit in the concept of ordered liberty" and "deeply rooted in the Nation's history." *Id.*, p. 268.

Contrary to the Supreme Court of Ohio, however, the Court of Appeals for the Third Circuit expressly rejected the application of strict judicial scrutiny to the ordinance restricting movement challenged in *Lutz* and, instead, applied intermediate judicial scrutiny. *Id.*, p. 269. The Court accurately held: "Not every governmental burden on fundamental rights must survive strict scrutiny. . . . " *Id.* This is the alternative position advocated by the City in *Johnson* and before this Court. The Supreme Court of Ohio, however, erroneously held in the case at bar: "Any deprivation of the right to travel . . . must be evaluated under a compelling interest test" and must be the least restrictive alternative. App. 17. The Supreme Court of Ohio disregarded the teaching of this Court that not all limitations on rights are subject to strict scrutiny. "[T]he same degree of [narrow] tailoring is not required of these regulations [limiting speech], and least-restrictive alternative analysis is wholly out of place." *Ward v. Rock Against Racism*, 491 U.S. 781, 798, ft. 6,[1] 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989).

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[1] Movement, in and of itself, is mere conduct. Even a limitation on *expressive* conduct, unrelated to the content of the expression, is only entitled to the form of intermediate scrutiny review established in *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).

There are, therefore, four different legal theories presented by federal appellate courts and the Supreme Court of Ohio describing the nature of an individual's interest in movement and the proper standard of judicial review for evaluating a government limitation on that interest: 1) the interest is not protected by Fourth Amendment or substantive due process principles and rational basis review applies; 2) the interest is protected by the Fourth Amendment and the reasonableness standard applies; 3) the interest is protected by substantive due process and intermediate scrutiny applies; 4) the interest is protected by substantive due process and strict scrutiny applies.

The case at bar is an opportunity for this Court to clearly establish that the legal nature of a lawfully arrested or convicted individual's interest in movement is not identical to the interest of an individual who has not been lawfully arrested or convicted. The proper standard of judicial review for evaluating a government limitation on the interest of a lawfully arrested or convicted individual in intrastate movement is either the rational basis review expressed by the United States Court of Appeals for the Sixth Circuit, the Fourth Amendment's reasonableness standard as suggested by the First Circuit or another form of intermediate judicial scrutiny as applied by the Third Circuit, not the strict judicial scrutiny applied in the case at bar by the Supreme Court of Ohio.

III. THE SUPREME COURT OF OHIO HAS UNCONSTITUTIONALLY PRECLUDED LOCAL GOVERNMENTS FROM REMEDIALLY EXCLUDING AN INDIVIDUAL LAWFULLY ARRESTED OR CONVICTED OF SPECIFIED DRUG CRIMES FROM A HIGH DRUG CRIME NEIGHBORHOOD

Based on its acceptance of the *Johnson* court's erroneous finding under federal double jeopardy analysis that the City's exclusion zone ordinance "imposed a criminal punishment and not merely a civil penalty" (App. 22) and based on its erroneous assumption that the City had not appealed the *Johnson* decision to the United States Court of Appeals for the Sixth Circuit (App. 5) (the City did appeal the *Johnson* court's erroneous conclusion that the exclusion zone ordinance was punitive and that issue is also pending for decision before the United States Court of Appeals for the Sixth Circuit, Case No. 00-4477), the Supreme Court of Ohio held that the City ordinance was a punishment that violated the Ohio Constitution.[2]

The Supreme Court of Ohio did not apply any form of judicial review to reach its conclusion that the City ordinance was punitive. It merely accepted, without analysis, the *Johnson* court's federal double jeopardy conclusion.[3] The *Johnson* court's federal double jeopardy

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[2] The Oregon Court of Appeals evaluated the comparable exclusion zone ordinance enacted by Portland, Oregon, and held that a 90 day exclusion from a neighborhood following arrest for an enumerated drug offense was a civil limitation, not a criminal punishment. *Oregon v. James*, 978 P.2d 415 (1999).

[3] This Court has jurisdiction since the decision of the Supreme Court of Ohio is interwoven with federal law and the adequacy and independence of a state law ground is not clear

analysis was cryptic and flawed, and misapplied the *Mendoza-Martinez* factors established by this Court for determining whether a government act constitutes criminal punishment. 119 F. Supp. 2d at 747-749, describing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963).

Like the Supreme Court of Ohio, the federal court in *Johnson* found that the City had a compelling government interest in protecting neighborhoods from rampant drug crime. 119 F. Supp. 2d 735, 743 (S.D. Ohio 2000). The federal court correctly held that Cincinnati Municipal Code Chapter 755 was intended to be civil rather than criminal and that the City has a compelling interest "in preventing drug abusers from repeating their criminal drug abuse in neighborhoods struggling to improve safety and the quality of life of their residents." *Id.* However, the federal court in *Johnson* and, by implication, the Supreme Court of Ohio in the case at bar, disregarded the "heavy burden" on a challenger to prove that a civil remedy is, in fact, a criminal punishment, *Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997), and ignored that "only the clearest proof" is sufficient to invalidate an ordinance on the ground that it has a punitive effect that exceeds its stated purpose. *United States v. Ward*, 448 U.S. 242, 249, 100 S.Ct. 2636, 65 L.Ed.2d 742 (1980).

If a particular restriction is reasonably related to a legitimate governmental objective it does not, without

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from the face of the court's opinion. *Ohio v. Johnson*, 467 U.S. 493, 497, ft.7, 104 S.Ct. 2536, 81 L.Ed.2d 425 (1984).

more, amount to punishment. *Bell, et al. v. Wolfish, et al.*, 441 U.S. 520, 539, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). This Court acknowledged that all civil penalties have some deterrent effect and that double jeopardy "does not prohibit the imposition of any additional sanction that could 'in common parlance' be described as punishment. . . . " *Hudson v. United States*, 522 U.S. 93, 98-99, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997).

The *Mendoza-Martinez* factors consider 1) whether a civil remedy is an "affirmative disability or restraint" like physical incarceration or commitment, *Hudson v. United States, supra*, 522 U.S. at 104, *Kansas v. Hendricks, supra*, 521 U.S. at 363; 2) its historical use as a punishment; 3) the requirement of a criminal *mens rea*; 4) the promotion of the traditional retribution aims of punishment; 5) the nature of the underlying conduct for which the civil remedy is imposed; 6) the civil rationale; and 7) the effect of the remedy in relation to the government interest.

Temporary exclusion from a neighborhood is not a punitive criminal-type physical incarceration or a commitment; unlike the analogy to "banishment" used by the federal district court, the temporary civil exclusion from one neighborhood has not historically been considered punishment, the temporarily excluded individual is not required to quit the entire territory of the sovereign, the exclusion is not permanent, and there are numerous exceptions in Chapter 755 solely for the needs and benefits of the excluded person; Chapter 755 does not require a finding of criminal *mens rea* and evidence of prior criminal conduct (the existence of the underlying drug offense) does not render the ordinance punitive, *Allen v. Illinois*, 478 U.S. 364, 371, 106 S.Ct. 2988, 92 L.Ed.2d 296

(1986); the ordinance does not promote the traditional retribution aims of punishment (the deterrent effect of a civil remedy does not render the civil remedy a criminal punishment, *Hudson v. United States, supra,* 522 U.S. at 102).

Furthermore, the fact that the underlying drug conduct for which the civil remedy is imposed is already a crime is an insufficient basis to conclude that the exclusion is a criminal penalty (*Hudson v. United States, supra,* 522 U.S. at 105, *United States v. Ursery,* 518 U.S. 267, 292, 116 S.Ct. 2135, 135 L.Ed.2d 549 (1996); this Court has "noted on a number of occasions that 'Congress may impose both a criminal and a civil sanction in respect to the same act or omission,' " *United States v. Ward, supra,* 448 U.S. at 249-51); the fact that the conduct to which the civil remedy is applied is already a crime is no evidence, much less the "clearest proof," that the temporary exclusion of an arrested or convicted individual from a high drug crime neighborhood is a criminal penalty.

Finally, not only does Chapter 755 have a civil rationale, the Supreme Court of Ohio conceded that the City was advancing a compelling government interest, App. 17-18 ("The destruction of some neighborhoods by illegal drug activity has created a crisis of national magnitude, and governments are justified in attacking the problem aggressively;" this Court has emphasized that: "If detention for the purpose of protecting the community from harm necessarily constituted punishment then all involuntary civil commitments would have to be considered punishment. But we have never so held." *Kansas v. Hendricks, supra,* 521 U.S. at 363); given the City's compelling government interest and the limited and temporary

restriction on a lawfully arrested or convicted individual's movement, Chapter 755 is not excessive in relation to that compelling government interest.

These *Mendoza-Martinez* factors demonstrate that the Supreme Court of Ohio did not have the "clearest proof" that Chapter 755 is punitive in effect and nullifies the ordinance's civil and remedial benefits. The legislative record is that drug crime is rampant in the Over the Rhine neighborhood of Cincinnati, recidivism contributes to that rampant drug crime, and a comparable exclusion zone ordinance in Portland, Oregon, was very successful in remediating this problem. The Supreme Court of Ohio implicitly misapprehended and misapplied federal double jeopardy law.

CONCLUSION

There is a conflict in the State of Ohio between the state judiciary and the federal judiciary on a matter of federal constitutional law, the nature of the interest of a lawfully arrested or convicted individual in intrastate movement. The Supreme Court of Ohio held one way, the United States Court of Appeals for the Sixth Circuit held another. Other federal appellate courts offer yet different opinions.

This Court should grant this Petition for Writ of Certiorari in order to establish the deference state courts must accord federal appellate court decisions on issues of federal constitutional law, to define the nature of the protection the United States Constitution provides to a lawfully arrested or convicted individual's interest in

intrastate movement, and to declare that a municipality may combat rampant high drug crime in a neighborhood by temporarily excluding lawfully arrested or convicted individuals without violating double jeopardy principles.

Respectfully submitted,

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Supreme Court of Ohio.

The STATE of Ohio, Appellee,

v.

BURNETT, Appellant.

No. 00-266.

Submitted March 13, 2001.
Decided Oct. 17, 2001.

Fay D. DuPuis, City Solicitor, Terrence R. Cosgrove, Cincinnati City Prosecutor, and Jennifer Bishop, Assistant Prosecutor, for appellee.

Bruce F. Thompson, Hamilton County Public Defender's Office, for appellant.

Raymond Vasvari, Cleveland, and Bernard F. Wong, Cincinnati, urging reversal for amicus curiae, the American Civil Liberties Union of Ohio Foundation.

MOYER, C.J.

On August 7, 1996, appellee, the city of Cincinnati, passed Ordinance No. 229-1996. The ordinance enacted Chapter 755 of the Cincinnati Municipal Code, which established drug-exclusion zones within the city. In passing the ordinance, the city council stated that certain areas of the city have a higher incidence of drug-related activity, which leads to the degradation of those areas. Ordinance No. 229-1996, Section 1(A). Further, the city council theorized that many people arrested for or convicted of drug offenses frequently returned to these areas. Section 1(B). Finding that its existing laws did not adequately control drug-related activity and that the public interest in "preventing the harmful effects of illegal drug

abusers" was great, Sections 1(E) and (F), the city created a drug-exclusion zone under Chapter 755.[1]

The ordinance states that "drug-exclusion zones are those areas of the city as designated by the city council under Chapter 755 of this code, which are areas where the number of arrests for the crimes listed in Chapter 755-5 and other drug-abuse related crimes * * * is significantly higher than that for other similarly situated/sized areas of the city." Cincinnati Municipal Code 755-1. Chapter 755 subjects a person to exclusion for ninety days from the public streets, sidewalks, and other public ways in all drug-exclusion zones if the person is arrested or taken into custody within any drug-exclusion zone for any of several enumerated offenses.[2] Cincinnati Municipal Code 755-5. If the offender is subsequently convicted of the crime for which he or she was arrested, the offender is prohibited for one year from the date of conviction from being on any public street, sidewalk, or other public way in all drug-exclusion zones. *Id.* If an excluded person is found within a drug-exclusion zone

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[1] The enactment initially created only one drug-exclusion zone. It is an area of the city known as "Over the Rhine." See Cincinnati Municipal Code 755-15.

[2] The offenses include corrupting another with drugs in violation of R.C. 2925.02, drug trafficking in violation of R.C. 2925.03, drug abuse in violation of R.C. 2925.11 (except for minor misdemeanor violations), possessing drug-abuse instruments in violation of R.C. 2925.12, possessing drug paraphernalia in violation of R.C. 2925.14, illegal processing of drug documents in violation of R.C. 2925.23, abusing harmful intoxicants in violation of R.C. 2925.31, trafficking in harmful intoxicants in violation of R.C. 2925.32, and offenses involving counterfeit controlled substances in violation of R.C. 2925.37.

during the exclusion period, that person is subject to immediate arrest for criminal trespass pursuant to R.C. 2911.21. *Id.*

At the time a person is arrested within a drug-exclusion zone for any of the crimes listed in Section 755-5, the officer making the arrest may, but is not required to, deliver a written notice excluding the person from all drug-exclusion zones. Cincinnati Municipal Code 755-9. If notice is given, it shall specify the areas designated as drug-exclusion zones and it shall provide information concerning the right to appeal the exclusion notice as provided in Section 755-11. *Id.*

If a person is served with an exclusion notice, an appeal of the exclusion may be filed with the director of safety within five calendar days of the issuance of the notice. Cincinnati Municipal Code 755-11. A hearing on the appeal must then be conducted by the director of safety within thirty days. Cincinnati Municipal Code 755-11(1)(a), 755-13(B)(a). During the pendency of the appeal, the exclusion does not take effect. Cincinnati Municipal Code 755-11(1)(b). The city has the burden to show by a preponderance of the evidence that the exclusion is based on conduct outlined in Section 755-5. Cincinnati Municipal Code 755-11(1)(b). A conviction for any of the crimes listed in Section 755-5 or a determination that the arresting officer had probable cause to arrest a person for such crimes is *prima facie* evidence that the exclusion was based on prohibited conduct. Cincinnati Municipal Code 755-11(2)(a).

A variance from an exclusion may also be granted at any time during the exclusion by the chief of police or by

a social service agency that provides services within the drug-exclusion zone only for reasons relating to the health, welfare, or well-being of the person excluded, or for drug-counseling services. Cincinnati Municipal Code 755-11(2)(b). The chief of police must grant a variance to any person who can establish that he or she is a bona fide resident of the drug-exclusion zone or a bona fide owner, principal, or employee of a place of lawful employment located in the drug-exclusion zone. *Id.* All variances must be in writing, and the person must keep the variance with him or her at all times within a drug-exclusion zone. Cincinnati Municipal Code 755-11(2)(c). If the person is found to be outside the scope of the variance or is arrested for conduct prohibited by state or federal drug laws, the variance immediately becomes void. Cincinnati Municipal Code 755-11(2)(c) and (d).

On February 7, 1998, appellant, George Burnett, was arrested for one of the designated drug offenses and was given a ninety-day exclusion notice from the Over the Rhine drug-exclusion zone by the arresting police officer. Immediately upon conviction of the charge, Burnett was served by the city with a notice of a one-year exclusion from the Over the Rhine drug-exclusion zone. On June 23, 1998, Burnett was found to be present in the drug-exclusion zone and was arrested for criminal trespass in violation of R.C. 2911.21.

The trial court overruled Burnett's motion to dismiss, in which he argued that Chapter 755 of the Cincinnati Municipal Code is unconstitutional. Burnett was convicted as charged. Upon Burnett's appeal to the First District Court of Appeals, the judgment of the trial court

was affirmed. The case is now before this court pursuant to the allowance of a discretionary appeal.

The issue is whether Chapter 755 of the Cincinnati Municipal Code is constitutional. Burnett argues that the one-year exclusion[3] violates the freedom of assembly and association guaranteed by the First Amendment to the United States Constitution and the right to travel guaranteed by the Fourteenth Amendment to the United States Constitution.

As an initial matter, we consider a question of federalism. After the court of appeals issued its opinion in this case, the United States District Court for the Southern District of Ohio ruled in a separate case, *Johnson v. Cincinnati*, (S.D.Ohio 2000), 119 F.Supp.2d 735, that Chapter 755 of the Cincinnati Municipal Code is unconstitutional because it violates rights to freedom of association and freedom of movement.[4] The *Johnson* decision has not been appealed to the United States Court of Appeals for the Sixth Circuit, and counsel for appellant indicated during oral argument that the city has suspended enforcement of Chapter 755 since the *Johnson* decision was issued. The federalism question is whether a state supreme court is bound by an application of federal constitutional law by a

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[3] Burnett has not challenged the ninety-day exclusion provision of Chapter 755, and, therefore, the constitutionality of the ninety-day provision is not before this court.

[4] The constitutional arguments in *Johnson* are the same as those presented by Burnett in the present case.

federal trial court under the Supremacy Clause of the United States Constitution.[5]

The question of whether a state court is required to follow a federal trial court's interpretation of federal constitutional law is largely unsettled, and the United States Supreme Court has yet to definitively address the subject. Several federal circuit courts and state supreme courts have held that state courts are bound by a decision of a lower federal court, but this rule is not universal. See, *e.g., Yniguez v. Arizona* (C.A.9, 1991), 939 F.2d 727, 736; *Fretwell v. Lockhart* (C.A.8, 1991), 946 F.2d 571, 577, reversed on other grounds (1993), 506 U.S. 364, 113 S.Ct. 838, 122 L.Ed.2d 180; *Busch v. Graphic Color Corp.* (1996), 169 Ill.2d 325, 335, 214 Ill.Dec. 831, 837, 662 N.E.2d 397, 403; *Anderson v. Wagner* (1980), 207 Neb. 87, 91, 296 N.W.2d 455, 458.

Article VI of the United States Constitution provides, "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof * * * shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." It has long been settled that the Supremacy Clause binds state courts to decisions of the United States Supreme Court on questions of federal statutory and constitutional law. See *Cooper v. Aaron* (1958), 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5; *Elmendorf v. Taylor* (1825), 23 U.S. (10 Wheat.) 152, 6 L.Ed. 289; *Martin v. Hunter's Lessee*

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[5] Counsel for Cincinnati addressed this issue pursuant to this court's order to show cause why we should not follow the decision of the District Court for the Southern District of Ohio.

(1816), 14 U.S. (1 Wheat.) 304, 4 L.Ed. 97. The United States Supreme Court has not, however, indicated whether state courts are bound by inferior federal court decisions.

The language of the Supremacy Clause is sufficiently broad ("the Laws of the United States") to encompass all federal court decisions, and the Supreme Court has stated that state courts are bound by lower federal court decisions in cases involving the Federal Employers' Liability Act ("FELA"). In *S. Ry. Co. v. Gray* (1916), 241 U.S. 333, 338-339, 36 S.Ct. 558, 561, 60 L.Ed. 1030, 1034, the court stated, "As the action is under Federal Employers' Liability Act, rights and obligations depend upon it and applicable principles of common law *as interpreted and applied in Federal courts.*" (Emphasis added.) Likewise, in *Urie v. Thompson* (1949), 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282, 1294-1295, quoting the first appeal to the Supreme Court of Missouri, *Urie v. Thompson* (1943), 352 Mo. 211, 218, 176 S.W.2d 471, 474, the court stated that FELA does not define negligence, leaving that question to be determined " 'by the common law principles as established and applied *in the federal courts.*' " (Emphasis added.)

The holdings in these cases suggest that inferior federal court decisions bind state courts. Scholars have argued, however, that these opinions simply reaffirm the general principle of the Supremacy Clause, or declare only that the federal common law, not state law, applies in FELA cases. See Donald H. Zeigler, Gazing Into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law (1999), 40 Wm. & Mary L.Rev. 1143, 1170. Two Supreme Court justices have

also opined that state courts are not bound by lower federal court decisions, but that the decisions should be only persuasive. See *Lockhart v. Fretwell* (1993), 506 U.S. 364, 376, 113 S.Ct. 838, 846, 122 L.Ed.2d 180, 193 (Thomas, J., concurring); *Steffel v. Thompson* (1974), 415 U.S. 452, 482, 94 S.Ct. 1209, 1227, 39 L.Ed.2d 505, 528, fn. 3 (Rehnquist, J., concurring).

From a historical perspective, the prospect that states would disregard federal law was the catalyst for the inclusion of the Supremacy Clause in the Constitution. See The Federalist Nos. 27 and 34, at 177, 204-205 (Alexander Hamilton) (Clinton Rossiter Ed., 1961); The Federalist No. 44, at 286-287 (James Madison). The intention of the drafters of the United States Constitution to extend the application of the Supremacy Clause to any federal court that would later be created, however, has not been definitively determined by the United States Supreme Court, and the federal courts of appeals are split on the issue. For instance, *United States ex rel. Lawrence v. Woods* (C.A.7, 1970), 432 F.2d 1072, holds that state courts are not bound by federal district court decisions. In *Woods*, the Seventh Circuit held that a federal district court's ruling that an ordinance was unconstitutional was not binding on that state's supreme court. The court based its decision on several state appellate court decisions and its recognition that finality of determination in respect to the laws of the United States rests in the Supreme Court of the United States and that the lower federal courts exercise no appellate jurisdiction over state courts. *Id.* at 1075-1076; see, also, *State v. Glover* (1978), 60 Ohio App.2d

283, 287, 14 O.O.3d 253, 255, 396 N.E.2d 1064, 1067 (concluding that Ohio appellate courts are not bound by lower federal court opinions).

The reasoning in *Woods* reflects the argument that state courts need not follow lower federal court decisions. In cases similar to the one before us, there is a determination on federal law made by a federal trial court in one case and a potential for myriad state court opinions on the same subject. The problem with this approach is that criminal statutes may or may not be enforced depending on which forum, state or federal, in which the subsequent challenge is brought.

Given the uncertainty, we are reluctant to abandon our role in the system of federalism created by the United States Constitution until the United States Supreme Court directs us otherwise. Both inferior federal courts and state courts serve as "laboratories for experimentation to devise various solutions where the best solution is far from clear." *United States v. Lopez* (1995), 514 U.S. 549, 581, 115 S.Ct. 1624, 1641, 131 L.Ed.2d 626, 652 (Kennedy, J., concurring). We therefore conclude that we are not bound by rulings on federal statutory or constitutional law made by a federal court other than the United States Supreme Court. We will, however, accord those decisions some persuasive weight. Cf. *State ex rel. Heller v. Miller* (1980), 61 Ohio St.2d 6, 8, 15 O.O.3d 3, 4, 399 N.E.2d 66, 67. Therefore, the declaration by the United States District Court for the Southern District of Ohio in *Johnson*, 119 F.Supp.2d 735, that the Cincinnati ordinance is unconstitutional does not end our inquiry. We now address Burnett's arguments.

I. Freedom of Association.

The First Amendment provides, "Congress shall make no law * * * abridging * * * the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." From these words, the United States Supreme Court has recognized a right of association. *Roberts v. United States Jaycees* (1984), 468 U.S. 609, 617-618, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462, 471. This right of association encompasses two distinct types of freedoms.

The first type of freedom of association includes the choice to enter into and to maintain certain intimate human relationships. *Dallas v. Stanglin* (1989), 490 U.S. 19, 23-24, 109 S.Ct. 1591, 1594, 104 L.Ed.2d 18, 25; *Roberts*, 468 U.S. at 617-618, 104 S.Ct. at 3249, 82 L.Ed.2d at 470. These types of associations are those traditional personal bonds that have " 'played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs.' " *FW/PBS, Inc. v. Dallas* (1990), 493 U.S. 215, 237, 110 S.Ct. 596, 611, 107 L.Ed.2d 603, 626, quoting *Roberts*, 468 U.S. at 618-619, 104 S.Ct. at 3249-3250, 82 L.Ed.2d at 472. Accordingly, these relationships are protected as fundamental, personal liberties. *Roberts*, 468 U.S. at 618, 104 S.Ct. at 3249, 82 L.Ed.2d at 471.

The second type of freedom is the right to associate for the purpose of engaging in expressive activity protected by the First Amendment. *Stanglin*, 490 U.S. at 24, 109 S.Ct. at 1595, 104 L.Ed.2d at 25. This includes rights of free speech, assembly, petition for the redress of grievances, and the exercise of religion. *Id.*

Burnett argues that the Cincinnati ordinance is unconstitutional because it impermissibly burdens the right of association by preventing him from entering the Over the Rhine area of Cincinnati. In this respect, the Cincinnati ordinance is similar to an ordinance we analyzed in *Cleveland v. Trzebuckowski* (1999), 85 Ohio St.3d 524, 709 N.E.2d 1148.

In *Trzebuckowski*, the ordinance forbade minors to enter billiard halls. We held that the ordinance did nothing on its face to burden the creation and development of intimate personal relationships deemed to be fundamental. *Id.* at 529, 709 N.E.2d at 1152. Rather, the ordinance merely prohibited the development of personal relationships within billiard halls, and, thus, there was no violation of a fundamental, personal liberty. *Id.*

We also held in *Trzebuckowski* that the ordinance did not infringe the right to associate for the purpose of engaging in expressive activity protected by the First Amendment. There was no assertion that minors entered billiard halls to engage in protected conduct, merely that they might. *Id.* In quoting the *Stanglin* opinion, we observed, " 'It is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.' " *Id.*, quoting *Stanglin*, 490 U.S. at 25, 109 S.Ct. at 1595, 104 L.Ed.2d at 25-26.

Similar to the ordinance in *Trzebuckowski*, the Cincinnati ordinance does not burden associational rights. On its face, the ordinance does not prohibit or interfere with

fundamental, personal relationships. Nor does the ordinance facially infringe the rights of a citizen to associate with other citizens for the purpose of engaging in protected First Amendment activities. Instead, the ordinance simply prohibits access to Over the Rhine. Furthermore, Burnett has not presented any facts that would indicate that the ordinance, as applied to him, interfered with his First Amendment freedoms. Therefore, because the ordinance prohibits access only to a particular area of the city, and because Burnett has not demonstrated that he personally has been denied his First Amendment freedoms, Chapter 755 of the Cincinnati Municipal Code does not burden the right of association guaranteed by the First Amendment to the United States Constitution. Cf. *Johnson,* 119 F.Supp.2d 735 (declaring that Chapter 755 of the Cincinnati Municipal Code violates the First Amendment on an as-applied basis only); *Trzebuckowski,* 85 Ohio St.3d at 529, 709 N.E.2d at 1152.

II. The Right to Travel.

Burnett also argues that Chapter 755 of the Municipal Code is unconstitutional because it impermissibly burdens the right to travel. Burnett alleges that the right to travel is a personal liberty protected by the Fourteenth Amendment to the United States Constitution and that Chapter 755 infringes upon this personal liberty by punishing wholly innocent or constitutionally protected conduct. We agree that Chapter 755 of the Cincinnati Municipal Code has impermissibly burdened a fundamental, guaranteed personal liberty by extending its reach further than necessary to advance the public interests it declares.

In all the cases addressing the right to travel, the United States Supreme Court has examined only the right to travel from one state to another.[6] To date, the court has not expressly recognized a constitutional right of travel within a state. Burnett argues, however, that a right of intrastate travel exists and that the Cincinnati ordinance has impermissibly burdened this right. Precedent of the United States Supreme Court and federal courts of appeals, and our own precedent cause us to conclude that such a constitutional right of travel within a state exists and that the Cincinnati ordinance has unconstitutionally burdened that right.

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[6] In its latest case addressing the right to travel, the United States Supreme Court identified three components of the right to travel: (1) it protects the right of a citizen of one state to enter and leave another state, (2) it protects the right to be treated as a welcome visitor rather than as a hostile visitor when temporarily in the second state, and (3) it protects the right to be treated like other citizens of a state when the traveler decides to become a permanent resident. *Saenz v. Roe* (1999), 526 U.S. 489, 500, 119 S.Ct. 1518, 1525, 143 L.Ed.2d 689, 702. The court stated that the second component is protected by the Privileges or Immunities Clause of Section 2, Article IV of the United States Constitution. *Id.* at 501, 119 S.Ct. at 1525, 143 L.Ed.2d at 703. Likewise, protection of the third component is grounded in the Privileges or Immunities Clause of the Fourteenth Amendment. *Id.* at 502-503, 119 S.Ct. at 1526, 143 L.Ed.2d at 702-703. Cf. *The Slaughter-House Cases* (1873), 83 U.S. (16 Wall.) 36, 21 L.Ed. 394 (the Privileges or Immunities Clause of the Fourteenth Amendment protects only those rights of citizenship that owe their existence to the federal government, its national character, its Constitution, or its laws, but it is not a source of protection for unenumerated rights). As Roe involved only the second and third components of the right to travel, however, the court declined any further discussion of the first component. 526 U.S. at 501, 119 S.Ct. at 1525, 143 L.Ed.2d at 702.

As suggested by the United States Supreme Court, the right of travel is most likely protected from state interference by the Due Process Clause of the Fourteenth Amendment. See, *e.g., Kent v. Dulles* (1958), 357 U.S. 116, 125, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204, 1210 ("The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment"); *Williams v. Fears* (1900), 179 U.S. 270, 274, 21 S.Ct. 128, 129, 45 L.Ed. 186, 188 ("the right to remove from one place to another according to inclination, is an attribute of * * * liberty * * * secured by the Fourteenth Amendment"). When evaluating whether substantive due process protects unenumerated rights, the question, as articulated by Justice Scalia, is whether the asserted right is " 'so rooted in the traditions and conscience of our people as to be ranked fundamental.' " *Michael H. v. Gerald D.* (1989), 491 U.S. 110, 122, 109 S.Ct. 2333, 2342, 105 L.Ed.2d 91, 105, quoting *Snyder v. Massachusetts* (1934), 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674, 677 (Cardozo, J.).

We therefore look to those rights that are so deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty that neither liberty nor justice would exist if they were surrendered. *Moore v. E. Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531, 540. In affording protection to unenumerated rights, however, we must be mindful that a " 'careful description' of the asserted fundamental liberty interest" is required. *Washington v. Glucksberg* (1997), 521 U.S. 702, 721, 117 S.Ct. 2258, 2268, 138 L.Ed.2d 772, 788, quoting *Reno v. Flores* (1993), 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1, 16; see, also, *Michael H.*, 491

U.S. at 127, 109 S.Ct. at 2344, 105 L.Ed.2d at 108, fn. 6 (the relevant traditions must be identified and evaluated at the most specific level of generality possible.) The sole purpose of this limiting function is to provide fundamental protection only to those traditions deeply woven into this Nation's historical fabric without overextending the Due Process Clause.

The right to travel is a liberty interest long enjoyed by every citizen residing within this Nation. As stated by Chief Justice Taney, "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, *as freely as in our own States.*" (Emphasis added.) *Smith v. Turner* (1849), 48 U.S. (7 How.) 283, 492, 12 L.Ed. 702, 790 (Taney, C.J., dissenting). The freedom to travel between states and throughout the Nation is one long enjoyed and wholeheartedly cherished. *United States v. Guest* (1966), 383 U.S. 745, 758, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239, 249; *Williams v. Fears* (1900), 179 U.S. 270, 274, 21 S.Ct. 128, 129, 45 L.Ed. 186, 188. The word "travel" is not mentioned within the text of the Constitution. "Yet the 'constitutional right to travel from one State to another' is firmly embedded in our jurisprudence." *Saenz v. Roe* (1999), 526 U.S. 489, 498, 119 S.Ct. 1518, 1524, 143 L.Ed.2d 689, 701, quoting *Guest*, 383 U.S. at 757, 86 S.Ct. at 1178, 16 L.Ed.2d at 249. Indeed, "the right is so important that it is 'assertable against private interference as well as governmental action * * * a virtually unconditional personal right, guaranteed by the Constitution to us all.' " *Id.*, quoting *Shapiro v. Thompson*

(1969), 394 U.S. 618, 643, 89 S.Ct. 1322, 1336, 22 L.Ed.2d 600, 620 (Stewart, J., concurring). Stated succinctly, "[t]he constitutional right to travel from one State to another * * * occupies a position *fundamental* to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized." (Emphasis added.) *Guest*, 383 U.S. at 757, 86 S.Ct. at 1178, 16 L.Ed.2d at 249.

In its most specific, careful description, the right of intrastate travel we contemplate is the right to travel locally through public spaces and roadways of this state. Historically, it is beyond contention that being able to travel innocently throughout the country has been an aspect of our national freedom. Likewise, the right to travel within a state is no less fundamental than the right to travel between the states. Every citizen of this state, much like the citizens of this Nation, enjoys the freedom of mobility not only to cross our borders into our sister states, but also to roam about innocently in the wide-open spaces of our state parks or through the streets and sidewalks of our most populous cities. This freedom of mobility is a tradition extending back to when the first settler crossed into what would eventually become this great state, and it is a tradition no Ohioan would freely relinquish.

The United States Supreme Court has stated that in addressing matters of substantive due process, the utmost care must be taken when being asked to break new ground in Fourteenth Amendment jurisprudence. *Collins v. Harker Hts.* (1992), 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261, 273. Unlike the asserted right evaluated in *Glucksberg* (assisted suicide), for example,

recognizing a right of intrastate travel is hardly groundbreaking. Much like the right to interstate travel, the right to intrastate travel has a long, historical recognition in the conscience and traditions of our people. As further observed by the Second Circuit, "[i]t would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state." *King v. New Rochelle Mun. Hous. Auth.* (C.A.2, 1971), 442 F.2d 646, 648. Without the one, there would never be the other.

As a fundamental right, the right to intrastate travel "is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law." *Kent v. Dulles* (1958), 357 U.S. 116, 125, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204, 1210. Any deprivation of the right to travel, therefore, must be evaluated under a compelling-interest test. See *Shapiro v. Thompson* (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600, overruled in part on other grounds by *Edelman v. Jordan* (1974), 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662. Accordingly, the legislation must be narrowly tailored to serve a compelling governmental interest. *Reno v. Flores* (1993), 507 U.S. 292, 301-302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1, 16.

Cincinnati asserts that the purposes of Chapter 755 are "restoring the quality of life and protecting the health, safety, and welfare of citizens using the public ways" in drug-exclusion zones and "allowing the public to use and enjoy the facilities in such areas without interference arising from illegal drug abuse and/or illegal drug abuse related crimes." Ordinance No. 229-1996, Section 1(D). We agree with the city that these asserted interests are

compelling. The destruction of some neighborhoods by illegal drug activity has created a crisis of national magnitude, and governments are justified in attacking the problem aggressively. When legislation addressing the drug problem infringes certain fundamental rights, however, more than a compelling interest is needed to survive constitutional scrutiny. The statute must also be narrowly tailored to meet the compelling interest. *Reno*, 507 U.S. at 301-302, 113 S.Ct. at 1447, 123 L.Ed.2d at 16. It is our opinion that while Chapter 755 is justified by a compelling interest, it fails constitutional analysis because the ordinance is not narrowly tailored to restrict only those interests associated with illegal drug activity, but also restricts a substantial amount of innocent conduct.

A person convicted of one of the crimes enumerated in Section 755-5 of the Cincinnati Municipal Code is immediately prohibited for one year from being on "public streets, sidewalk[s], and other public ways in all drug-exclusion zones designated in Chapter 755." Cincinnati Municipal Code 755-5. The exclusion is in addition to any criminal penalty for violating the provisions of the Ohio Revised Code. Only if the person is a bona fide resident of the drug-exclusion zone or is legally employed within the drug-exclusion zone does the restriction on travel not apply. Cincinnati Municipal Code 755-11(b)(i) and (ii). The chief of police and social services agencies also have discretion to grant a variance only for health reasons or for drug-abuse-related counseling services. Cincinnati Municipal Code 755-11(2)(b). The ordinance permits no other exceptions.

"A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks

to remedy." *Frisby v. Schultz* (1988), 487 U.S. 474, 485, 108 S.Ct. 2495, 2503, 101 L.Ed.2d 420, 432; *City Council of Los Angeles v. Taxpayers for Vincent* (1984), 466 U.S. 789, 808-810, 104 S.Ct. 2118, 2130-2132, 80 L.Ed.2d 772, 789-780. The Cincinnati ordinance extends beyond the problems associated with illegal drug activity and attacks any number of potential activities done with an innocent purpose. In this respect, the Cincinnati ordinance is similar to an ordinance we declared unconstitutional in *Akron v. Rowland* (1993), 67 Ohio St.3d 374, 618 N.E.2d 138.

In *Rowland*, the ordinance prohibited loitering for the purpose of engaging in drug-related activity. In declaring the ordinance unconstitutional, we found significant the fact that "a person does not have to *commit* a drug-related offense to violate the ordinance. The ordinance is prophylactic: it permits police to make an arrest before any crime has occurred. The police do not need to have any evidence that a crime has occurred or is about to occur – they can make an arrest based on subjective suspicion alone." (Emphasis *sic.*) *Id.* at 386, 618 N.E.2d at 148. The ordinance, we stated, "can easily implicate a person's status, associates, mere presence, or otherwise innocent behavior * * * [and therefore] encroach on a 'substantial amount of constitutionally protected conduct.' " *Id.* at 387, 618 N.E.2d at 149, quoting *Houston v. Hill* (1987), 482 U.S. 451, 459, 107 S.Ct. 2502, 2508, 96 L.Ed.2d 398, 410. Without a limit on the intrusions into innocent conduct the ordinance ran afoul of the Due Process Clause. *Id.* at 388, 618 N.E.2d at 149-150; *Columbus v. Thompson* (1971), 25 Ohio St.2d 26, 31-32, 54 O.O.2d 162, 165, 266 N.E.2d 571, 574; *Columbus v. DeLong* (1962), 173 Ohio St. 81, 83, 18 O.O.2d 294, 295, 180 N.E.2d 158, 160.

As the Akron ordinance in *Rowland* did, the Cincinnati ordinance encroaches upon a substantial amount of innocent conduct and is not, therefore, narrowly tailored. A person subject to exclusion is exposed to a criminal penalty by simply being in Over the Rhine. Cincinnati Municipal Code 755-5. The prohibited conduct is not limited to entering a drug-exclusion zone to engage in some type of illegal activity, such as the purchase or sale of drugs or corrupting another with drugs. Instead, the ordinance also attacks conduct that is completely innocent. A person subject to the exclusion ordinance may not enter a drug-exclusion zone to speak with counsel, to visit family, to attend church, to receive emergency medical care, to go to a grocery store, or just to stand on a street corner and look at a blue sky. None of these activities are performed with illegal intention, yet a criminal penalty attaches to them without any evidence of illegality, or improper purpose, or a finding that the person is likely to commit future drug offenses.

"A narrowly tailored ordinance would not authorize the arrest of a grandmother who entered Over the Rhine for the purpose of seeing her grandchildren. A narrowly tailored ordinance would not authorize the arrest of a homeless person who entered Over the Rhine to obtain food, shelter, and clothing from relief agencies. Nor would it prevent any person from meeting with his or her attorney at the attorney's place of business. A narrowly tailored ordinance would not authorize exclusion without, at a minimum, a finding that the particular person to be excluded was likely to repeat his crime in Over the Rhine." *Johnson v. Cincinnati*, 119 F.Supp.2d at 743-744; cf. R.C. 2950.01(E) and 2950.09(B)(1) through (3) (a finding

by clear and convincing evidence that a sexual offender is likely to commit future sexual offenses is required before the offender can be classified as a sexual predator). A narrowly tailored ordinance would not strike at an evil with such force that constitutionally protected conduct is harmed along with unprotected conduct. "The Constitution does not permit a legislature to 'set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large.' " *Chicago v. Morales* (1999), 527 U.S. 41, 60, 119 S.Ct. 1849, 1861, 144 L.Ed.2d 67, 82, quoting *United States v. Reese* (1875), 92 U.S. 214, 221, 23 L.Ed. 563, 566.

We hold that Chapter 755 of the Cincinnati Municipal Code violates the constitutional guarantee of the right of travel which is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Although the Cincinnati ordinance is supported by compelling interests, it is not narrowly tailored to address those interests.

III. Section 3, Article XVIII of the Ohio Constitution.

Burnett further argues that Chapter 755 of the Municipal Code is unconstitutional because it exceeds the local authority granted to the city by Section 3, Article XVIII of the Ohio Constitution, which provides: "Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." We agree.

As stated, Section 3, Article XVIII gives municipalities broad power to adopt laws and regulations that are not in conflict with general laws enacted by the General Assembly. An ordinance conflicts with the general laws if it " 'permits or licenses that which the statute forbids and prohibits, and vice versa.' " *Niles v. Howard* (1984), 12 Ohio St.3d 162, 165, 12 OBR 232, 234, 466 N.E.2d 539, 541, quoting *Struthers v. Sokol* (1923), 108 Ohio St. 263, 140 N.E. 519, paragraph two of the syllabus; see, also, *Sheffield v. Rowland* (1999), 87 Ohio St.3d 9, 716 N.E.2d 1121.

Burnett was excluded from the Over the Rhine area of Cincinnati for one year as a result of his conviction for a drug-related offense. This banishment, however, was not imposed by the court that convicted Burnett for his drug crime. Rather, the city (through its executive branch), per the terms of Chapter 755, served Burnett with a notice of exclusion following his conviction. This notice of exclusion authorized by Chapter 755 banished Burnett from Over the Rhine, *adding a criminal penalty for his drug offense that was neither imposed by a court nor authorized by statute.* See *Johnson v. Cincinnati* (S.D.Ohio 2000), 119 F.Supp.2d 735, 748 (holding that Chapter 755 imposed a criminal punishment and not merely a civil penalty); see, also, *Nixon v. Admr. of Gen. Serv.* (1977), 433 U.S. 425, 474, 97 S.Ct. 2777, 2806, 53 L.Ed.2d 867, 910-911 (observing that banishment is historically considered to be punishment).

By authorizing a punishment not provided by statute for violation of a statute, Cincinnati's drug-exclusion ordinance has permitted something that is prohibited under the state criminal code. Cf. *State v. Bilder* (1987), 39

Ohio App.3d 135, 529 N.E.2d 1292 (noting that a court may not pronounce a sentence that is unauthorized by statute). It is true that a municipal ordinance may proscribe the same conduct as a state criminal statute and impose a penalty greater than the state criminal code imposes. *Niles v. Howard*, 12 Ohio St.3d at 165, 12 OBR at 234, 466 N.E.2d at 541. But there is no authority for the proposition that a municipality may, by way of ordinance, add a penalty for violation of a *state criminal statute* that is not otherwise provided for by the General Assembly. The ordinance, therefore, is invalid under Section 3, Article XVIII of the Ohio Constitution.

IV. Conclusion.

For the foregoing reasons, we hold that Chapter 755 of the Cincinnati Municipal Code is an unconstitutional violation of the right to travel as guaranteed by the Fourteenth Amendment to the United States Constitution and a violation of Section 3, Article XVIII of the Ohio Constitution. The judgment of the court of appeals, therefore, is reversed.

Judgment reversed.

DOUGLAS, RESNICK, FRANCIS E. SWEENEY, SR., PFEIFER and LUNDBERG STRATTON, JJ., concur.

COOK, J., concurs separately.

COOK, J., concurring separately.

I agree with the majority that Chapter 755 of the Cincinnati Municipal Code violates the Ohio Constitution

and that Burnett's conviction for trespass should therefore be reversed. The majority goes a step further, however, and decides that Chapter 755 also violates the "right to travel," which it finds to be protected by the substantive Due Process Clause of the Fourteenth Amendment to the United States Constitution. I respectfully decline to join the majority's substantive-due-process analysis.

I

The Due Process Clause of the Fourteenth Amendment contains a substantive component that "provides heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg* (1997), 521 U.S. 702, 720, 117 S.Ct. 2258, 2267, 138 L.Ed.2d 772, 787. This doctrine of substantive due process forbids the government from infringing upon these fundamental liberty interests *at all*, regardless of the procedure provided, unless the infringement survives strict scrutiny; that is, the government's infringement must be "narrowly tailored to serve a compelling state interest." *Reno v. Flores* (1993), 507 U.S. 292, 302, 113 S.Ct. 1439, 1447, 123 L.Ed.2d 1, 16. In this case, the majority concedes that Cincinnati has a compelling interest in addressing the crisis associated with illegal drug activity. It concludes, however, that Cincinnati's drug-exclusion zone ordinance is not narrowly tailored to meet this compelling interest and therefore violates the Fourteenth Amendment.

As established by the United States Supreme Court, substantive-due-process analysis has two primary features. "First, we have regularly observed that the Due

Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,' * * * and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.' " *Glucksberg*, 521 U.S. at 720-721, 117 S.Ct. at 2268, 138 L.Ed.2d at 787-788, quoting *Moore v. E. Cleveland* (1977), 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531, 540 (plurality opinion), and *Palko v. Connecticut* (1937), 302 U.S. 319, 325, 326, 58 S.Ct. 149, 152, 82 L.Ed. 288, 292. Second, substantive-due-process cases require "a 'careful description' of the asserted fundamental liberty interest." *Id.*, quoting *Flores*, 507 U.S. at 302, 113 S.Ct. at 1447, 123 L.Ed.2d at 16.

Although the majority identifies the right to travel as a fundamental liberty protected by substantive due process, *Glucksberg* suggests otherwise. In *Glucksberg*, the court grappled with the question of whether a state statute banning assisted suicide violated substantive due process. The court concluded that there was no fundamental right to assistance in committing suicide. *Glucksberg*, 521 U.S. at 723-728, 117 S.Ct. at 2269-2271, 138 L.Ed.2d at 789-793. Before doing so, however, the court listed several specific freedoms that are subject to heightened scrutiny under substantive due process. *Id.* at 720, 117 S.Ct. at 2267, 138 L.Ed.2d at 787. These include (1) the right to marry, (2) the right to have children, (3) the right to direct the upbringing and education of one's children, (4) the right to marital privacy, (5) the right to use contraception, (6) the right to bodily integrity, and (7) the right to abortion. *Id.* (collecting cases recognizing these fundamental rights). Significantly, however, the court *did*

not list the right to travel among these freedoms. This omission strongly suggests that the right to travel is *not* one of the fundamental liberties subjected to heightened scrutiny under substantive due process. Because of the context in which the court listed the fundamental rights – *i.e.*, in a case conducting a searching inquiry as to the existence of a fundamental right to assisted suicide – *Glucksberg*'s list appears to be exhaustive.

The most recent right-to-travel case decided by the United States Supreme Court also calls into doubt the majority's substantive-due-process rationale. See *Saenz v. Roe* (1999), 526 U.S. 489, 119 S.Ct. 1518, 143 L.Ed.2d 689. In *Roe*, the court tested the validity of a California statute that limited the level of welfare benefits available to California residents who had only recently moved to the state. The plaintiffs alleged that California's restriction violated their constitutional right to travel by penalizing their decision to migrate to a new state.

Prior to *Roe*, the court had recognized the right to interstate travel as a basic constitutional right but had been less than clear about the textual source of that right in the Constitution. In *Roe*, however, the court clarified the constitutional sources of the right to travel as recognized in its prior cases:

"The 'right to travel' discussed in our cases embraces at least three different components. It protects [1] the right of a citizen of one State to enter and to leave another State, [2] the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and [3] for those travelers who elect to become permanent residents, the right to be

treated like other citizens of that State." *Roe*, 526 U.S. at 500, 119 S.Ct. at 1525, 143 L.Ed.2d at 702.

The court then examined which specific provision of the United States Constitution provides the source for each component of the right to travel. The court found that the second right-to-travel component is grounded in Section 2, Article IV of the Constitution, which guarantees that "a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits." *Roe*, 526 U.S. at 501, 119 S.Ct. at 1525, 143 L.Ed.2d at 703.[7] A state may not discriminate against citizens of other states " 'where there is no substantial reason for the discrimination beyond the mere fact that they are citizens of other States.' " *Id.* at 502, 119 S.Ct. at 1526, 143 L.Ed.2d at 703, quoting *Toomer v. Witsell* (1948), 334 U.S. 385, 396, 68 S.Ct. 1156, 1162, 92 L.Ed. 1460, 1471; see, also, *Baldwin v. Fish & Game Comm. of Montana* (1978), 436 U.S. 371, 98 S.Ct. 1852, 56 L.Ed.2d 354.

The court also clarified that the third component of the right to travel finds its textual source in the Privileges or Immunities Clause of the Fourteenth Amendment.[8] While acknowledging the existence of "fundamentally

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[7] Section 2, Article IV of the United States Constitution states: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

[8] The Privileges or Immunities Clause of the Fourteenth Amendment provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States * * *."

differing views concerning the coverage of the Privileges or Immunities Clause of the Fourteenth Amendment," the court concluded that the clause, at a minimum, protects the right of a United States citizen to move to any other state and enjoy the same rights (of state and federal citizenship) as any other citizen in that state. *Roe* at 503-504, 119 S.Ct. at 1526-1527, 143 L.Ed.2d at 704-705. The durational residency requirement at issue in *Roe* directly implicated this third component of the right to travel and was therefore subject to a more exacting level of scrutiny. "Neither mere rationality nor some intermediate standard of review should be used to judge the constitutionality of a state rule that discriminates against some of its citizens because they have been domiciled in the State for less than a year." *Id.* at 504, 119 S.Ct. at 1527, 143 L.Ed.2d at 704-705.

As for the first component of the right to travel, the court declined to identify a textual source. Because the statute at issue in *Roe* "does not directly impair the exercise of the right to free *interstate movement* * * *, we need not identify the source of that particular right in the text of the Constitution. The right of 'free ingress and regress to and from' neighboring States * * * may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.' " (Emphasis added.) *Id.* at 501, 119 S.Ct. at 1525, 143 L.Ed.2d at 702-703, quoting *United States v. Guest* (1966), 383 U.S. 745, 758, 86 S.Ct. 1170, 1178, 16 L.Ed.2d 239, 249.

Roe's search for the constitutional source of the right to travel raises considerable doubt about the majority's analysis in this case. *Roe* conspicuously fails to categorize

any aspect of the right to travel as being rooted in substantive due process. When read in conjunction with *Glucksberg*'s omission of the right to travel from its list of fundamental rights, *Roe*'s failure to identify substantive due process leads to the negative inference that substantive due process is *not* the constitutional source of the right. As a matter of federal constitutional law, then, it appears that the majority has either broken new ground in the field of substantive due process or has identified the incorrect source of the right to travel. Neither possibility affords adequate recognition of the Supreme Court's reluctance to expand the concept of substantive due process. See *Collins v. Harker Hts.* (1992), 503 U.S. 115, 125, 112 S.Ct. 1061, 1068, 117 L.Ed.2d 261, 273 (noting that the court exercises "the utmost care whenever we are asked to break new ground in this field").

II

Whatever its source, it is well settled that the right to *interstate* travel is "firmly embedded" in federal constitutional jurisprudence. *Roe*, 526 U.S. at 498, 119 S.Ct. at 1524, 143 L.Ed.2d at 701. But even if I accepted the majority's view that substantive due process provides the source of this right, I still could not join the analysis. The majority's conclusion depends not only on the notion that a fundamental right to interstate travel exists as a matter of substantive due process, but also on the notion that the right to *intra*state travel is included within this right. But this conclusion does not have firm support.

It is true that the United States Supreme Court has suggested the existence of a generalized right to free

movement that would logically encompass intrastate travel. See, *e.g., Aptheker v. Secy. of State* (1964), 378 U.S. 500, 505-506, 84 S.Ct. 1659, 1663, 12 L.Ed.2d 992, 997 (" 'Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage * * * Freedom of movement is basic in our scheme of values' "), quoting *Kent v. Dulles* (1958), 357 U.S. 116, 126, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204, 1210; *Kolender v. Lawson* (1983), 461 U.S. 352, 358, 103 S.Ct. 1855, 1859, 75 L.Ed.2d 903, 910 noting that a state statute challenged on vagueness grounds "implicate[d] consideration of the constitutional right to freedom of movement"); *Papachristou v. Jacksonville* (1972), 405 U.S. 156, 164, 92 S.Ct. 839, 844, 31 L.Ed.2d 110, 116-117 (identifying "wandering or strolling" from place to place as "historically part of the amenities of life"). But these cases suggesting some broad right of "free movement" have involved either travel across borders (whether state or international) or First Amendment vagueness issues; thus, any comments that can be construed to encompass some generalized right to movement are essentially dicta. See *Hutchins v. Dist. of Columbia* (C.A.D.C.1999), 188 F.3d 531, 537 (en banc; plurality opinion). Moreover, the Supreme Court has specifically *declined* to consider whether the right to interstate travel includes the right to intrastate travel. See *Mem. Hosp. v. Maricopa Cty.* (1974), 415 U.S. 250, 255-256, 94 S.Ct. 1076, 1081, 39 L.Ed.2d 306, 313.

Additionally, the Supreme Court's discussion of the constitutional right to interstate travel in *Bray v. Alexandria Women's Health Clinic* (1993), 506 U.S. 263, 113 S.Ct. 753, 122 L.Ed.2d 34, casts doubt on the proposition that a right to intrastate travel is included. In *Bray*, several

abortion clinics sued Operation Rescue under Section 1985(3), Title 42, U.S.Code, which provides a private cause of action for certain types of conspiracy. The plaintiffs alleged that Operation Rescue, through its concerted blockade of abortion clinics, conspired to violate, *inter alia*, the right to interstate travel. The Supreme Court held that the plaintiffs did not have a cognizable claim under Section 1985(3). Justice Scalia's opinion for the court explained one of the reasons:

"Respondents have failed to show a conspiracy to violate the right of interstate travel for yet another reason: Petitioners' proposed demonstrations would not implicate that right. The federal guarantee of interstate travel * * * protects interstate travelers against two sets of burdens: 'the erection of actual barriers *to interstate movement' and 'being treated differently' from intrastate travelers. Zobel v. Williams*, 457 U.S. 55, 60 [102 S.Ct. 2309, 2313, 72 L.Ed.2d 672, 677], n 6 (1982) * * * As far as appears from this record, the only 'actual barriers to . . . movement' that would have resulted from petitioners' proposed demonstrations would have been in the immediate vicinity of the abortion clinics, restricting movement from one portion of the Commonwealth of Virginia to another. *Such a purely intrastate restriction does not implicate the right of interstate travel*, even if it is applied intentionally against travelers from other States, unless it is applied *discriminatorily* against them." (First two emphases added.) *Bray*, 506 U.S. at 276-277, 113 S.Ct. at 763, 122 L.Ed.2d at 51.

This explanation of the interstate right to travel, particularly when read in conjunction with the court's later opinion in *Roe*, strongly suggests that a purely intrastate

restriction does not implicate the right to interstate travel unless the restriction discriminates against *interstate* travelers.

Admittedly, a number of federal cases have declared the existence of a fundamental right to intrastate travel or free movement. See, *e.g.*, *Nunez v. San Diego* (C.A.9, 1997), 114 F.3d 935, 944; *Lutz v. York* (C.A.3, 1990), 899 F.2d 255; *King v. New Rochelle Mun. Hous. Auth.* (C.A.2, 1971), 442 F.2d 646; *Schleifer v. Charlottesville* (W.D.Va.1997), 963 F.Supp. 534, 542-543. These cases, however, were decided before the Supreme Court's clarification of the right to travel in *Roe*. All three components of the right to travel described in *Roe* refer only to *inter*state travel; none of them would seem to include *intra*state travel, casting doubt on the proposition that the right to interstate travel includes a concomitant right to intrastate travel. And in any event, the cases asserting the existence of a fundamental right to intrastate travel do not reflect a consensus view among the circuits. See *Wardwell v. Cincinnati City School Dist. Bd. of Edn.* (C.A.6, 1976), 529 F.2d 625, 627-628 (rejecting a fundamental right to intrastate travel); *Wright v. Jackson* (C.A.5, 1975), 506 F.2d 900, 902-903 (same); see, also, *Townes v. St. Louis* (E.D.Mo.1996), 949 F.Supp. 731, 734-735 (noting split among federal circuits over whether fundamental right to intrastate travel exists and expressing doubt as to whether Eighth Circuit would recognize one), affirmed (C.A.8, 1997), 112 F.3d 514, 1997 WL 210442.

Further, the majority fails to explain why it applies strict scrutiny to the Cincinnati ordinance at issue here. In *Lutz*, one of the leading cases finding the existence of an intrastate travel right, the Third Circuit applied a form of

intermediate scrutiny to an "anticruising" ordinance alleged to violate the right to intrastate travel. Rather than follow the *Lutz* methodology, the majority opinion applies strict scrutiny to the Cincinnati ordinance despite the fact that the Supreme Court has applied strict scrutiny *only* to certain impediments to *interstate* travel, such as durational residency requirements. See, *e.g., Shapiro v. Thompson* (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; *Roe,* 526 U.S. at 504, 119 S.Ct. at 1527, 143 L.Ed.2d at 705. Moreover, other infringements to interstate travel have not triggered strict scrutiny. *Roe* acknowledged the applicability of something less than strict scrutiny in reviewing state regulations infringing on the second component of the right to travel. *Id.* at 502, 119 S.Ct. at 1526, 143 L.Ed.2d at 703 (Section 2, Article IV bars discrimination against out-of-staters " 'where there is no *substantial reason* for the discrimination beyond the mere fact that they are citizens of other States' " [emphasis added], quoting *Toomer v. Witsell,* 334 U.S. at 396, 68 S.Ct. at 1162, 92 L.Ed. at 1471).

For the foregoing reasons, I cannot join the majority's conclusion that there is a right to intrastate travel protected by the substantive Due Process Clause of the Fourteenth Amendment. That is not to say that the right to intrastate travel does not exist *at all* as a matter of constitutional law. In light of *Roe,* there could be a substantial argument that the Privileges or Immunities Clause of the Fourteenth Amendment protects some generalized right to free intrastate movement that a person may possess as a matter of state citizenship. See *United States v. Wheeler* (1920), 254 U.S. 281, 293, 41 S.Ct. 133, 134, 65 L.Ed. 270,

273 (observing that fundamental rights of state citizenship have historically included the right "to move at will from place to place therein"). Although the clause had been a virtual dead letter since *The Slaughter-House Cases* (1873), 83 U.S. (16 Wall.) 36, 21 L.Ed. 394, *Roe* suggests that the Supreme Court may breathe new life into it. See *Roe*, 526 U.S. at 521-522, 527, 119 S.Ct. at 1535-1536, 1538, 143 L.Ed.2d at 715-716, 719 (Thomas, J., dissenting).

Whether the right of intrastate travel exists as a matter of federal constitutional law, however, is a question we need not reach in order to resolve this case. As the majority correctly holds, the one-year exclusion imposed by Chapter 755 of the Cincinnati Municipal Code is not a valid exercise of the city's power and therefore violates the Ohio Constitution. On that basis, I concur in the judgment.

Court of Appeals of Ohio, First District,
Hamilton County.

STATE of Ohio, Plaintiff-Appellee,

v.

George BURNETT, Defendant-Appellant.

No. C-98-1003.

Dec. 23, 1999.

Fay D. Dupuis, Cincinnati City Solicitor, Terrence R. Cosgrove, Cincinnati Prosecuting Attorney, and Jennifer Bishop, Assistant Prosecutor, for Plaintiff-Appellee,

Bruce F. Thompson, for Defendant-Appellee.

SUNDERMANN.

OPINION.

Raising three assignments of error, defendant-appellant George Burnett appeals the trial court's judgment convicting him of criminal trespass in violation of R.C. 2911.21.

I. FACTS AND PROCEEDINGS

On February 7, 1998, Burnett was arrested for a drug-related offense in Over-the-Rhine, an area of the city of Cincinnati that had been designated by ordinance as a "Drug-Exclusion Zone."[1] As a result [sic] the arrest, Burnett was issued a "Notice of Exclusion" that prohibited him from entering Over-the-Rhine for ninety days. The notice also provided that Burnett would be subject to

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[1] See Cincinnati Municipal Code 755-15.

arrest for criminal trespass if he was found within Over-the-Rhine within the specified ninety-day period.

On February 25, 1998, following his conviction for the drug offense, Burnett was issued a second Notice of Exclusion pursuant to Cincinnati Municipal Code Chapter 755. This notice prohibited Burnett from entering Over-the-Rhine for one year and provided that violation of the exclusion order would subject him to prosecution for criminal trespass.

Thereafter, on June 23, 1998, while Burnett's one-year exclusion remained in effect, police observed him in Over-the-Rhine. As a result, he was arrested and charged with criminal trespass. After the trial court overruled Burnett's motion to dismiss the charge, the case was tried to the bench; Burnett was found guilty as charged. This appeal, in which Burnett raises three assignments of error, followed.

II. ASSIGNMENTS OF ERROR

A. CONSTITUTIONAL CHALLENGES

In his second assignment of error, Burnett asserts that the trial court erred in failing to grant his pretrial motion to dismiss the trespass charge, given that the charge was dependent upon his violation of the one-year exclusion notice that was issued pursuant to Cincinnati Municipal Code Chapter 755, an enactment that he contends is unconstitutional.

If Burnett is correct in his assertion that Cincinnati Municipal Code Chapter 755 is unconstitutional, it follows that the Notice of Exclusion issued to him was of no

force. And if the exclusion notice was of no effect, Burnett possessed every right to be present in Over-the-Rhine, and no basis for the trespass charge existed. Accordingly, we must examine Burnett's several challenges to the constitutionality of Cincinnati Municipal Code Chapter 755 to determine whether the trial court erred in denying his pretrial motion to dismiss the trespass charge. Before we turn to this examination, we provide a brief history of the law.

In September 1996, in an effort to curb the concentration of drug-related activity associated with specific areas of Cincinnati, the city council modified the Cincinnati Municipal Code by ordaining Chapter 755, entitled "Drug-Exclusion Zones."[2] Chapter 755 permits the council to designate specific areas within the city as drug-exclusion zones based on the higher incidence of drug-related crimes in those areas.[3] To date, the only designated drug-exclusion zone is Over-the-Rhine.[4] Pursuant to this designation, a person arrested within Over-the-Rhine for drug abuse, or any drug-abuse-related activity, is subject to exclusion from the public streets, sidewalks, and other public ways within Over-the-Rhine for a period of ninety days.[5] And where that person is later convicted of the drug offense, he or she is then subject to a second exclusion, which continues for a period of one year.[6]

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[2] See Ordinance No. 229-1996, ordaining Cincinnati Municipal Code Chapter 755.

[3] See Cincinnati Municipal Code 755-1 and 755-3.

[4] See Cincinnati Municipal Code 755-15.

[5] See Cincinnati Municipal Code 755-5.

[6] *Id.*

Furthermore, if an excluded person is found in Over-the-Rhine during one of these two exclusion periods, that person is subject to immediate arrest for criminal trespass pursuant to R.C. 2911.21.[7] In addition, Chapter 755 sets forth procedures for the issuance of notices of exclusion, for appealing from the issuance of such notices, and for obtaining variances from the exclusions.

For purposes of clarity, we note that although Chapter 755 contains two distinct exclusion provisions, one applying to individuals *arrested* in Over-the-Rhine for drug crimes and another applying to individuals *convicted* of drug crimes, the facts of the instant case implicate only the latter provision, as it was the one-year exclusion that triggered Burnett's arrest for trespass. Accordingly, our holding today is limited solely to a determination of the constitutionality of Chapter 755's one-year exclusion provision for convictions. We make no pronouncement regarding the constitutionality of the ninety-day exclusion for arrests. That issue will be addressed when it is properly before this court.

1. RIGHT OF PEACEABLE ASSEMBLY

Burnett contends that the facial overbreadth of Chapter 755 violates the right of peaceable assembly guaranteed by the First Amendment to the United States Constitution and by Section 3, Article I of the Ohio Constitution.[8] Presumably, this challenge contemplates

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[7] *Id.*

[8] Burnett does not specifically characterize his challenge to the ordinance as either "facial" or "applied." However, given

instances wherein an individual wishing to exercise his or her right to assemble peaceably for expressive purposes in Over-the-Rhine is prevented from doing so by virtue of an exclusion order issued pursuant to Chapter 755.

In the context of the First Amendment, the United States Supreme Court has altered its traditional rules of standing to permit attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.[9] Litigants, therefore, may challenge a law not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the law's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.[10] While the Supreme Court has entertained facial-overbreadth challenges in cases involving statutes that, "by their terms," sought to regulate "spoken words," and in cases where statutes, "by their terms, purport[ed] to regulate the time, place, and manner of expressive or communicative conduct,"[11] it has cautioned that application of the overbreadth doctrine to void a law is "strong

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that the facts of the case demonstrate that Burnett was not engaged in the type of activity protected by either the United States or the Ohio Constitution's right of assembly, he cannot assert that the ordinance, as applied to him, violates the right of assembly. Accordingly, we interpret his argument as a facial-overbreadth challenge.

[9] *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 612, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830.

[10] *Broadrick*, supra.

[11] *Broadrick*, supra, 413 U.S. at 612-613, 93 S.Ct. at 2916.

medicine" that should be employed "sparingly and only as a last resort."[12] Accordingly, the Court has held that "particularly where conduct and not merely speech is involved, * * * the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[13]

Chapter 755, by its own terms, does not target speech or expressive conduct; rather, it is a regulation of general conduct. As previously acknowledged, though, there are conceivable instances where the ordinance could affect expressive conduct such as the right of peaceable assembly. Judged in relation to the ordinance's predominantly legitimate application to nonexpressive conduct, however, these instances of encroachment are not substantial and, therefore, do not serve to justify invalidating the entire ordinance. Accordingly, we reject Burnett's overbreadth challenge.

2. RIGHT TO INTRASTATE TRAVEL

Burnett next asserts that Chapter 755 infringes on his fundamental right to travel in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, and in violation of Section 1, Article I of the Ohio Constitution. In response, the state correctly notes that Chapter 755

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[12] *Broadrick*, supra, 413 U.S. at 613, 93 S.Ct. at 2916.

[13] *Broadrick*, supra, 413 U.S. at 615, 93 S.Ct. 2918; see, also, *New York v. Ferber* (1982), 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113; *Regan v. Time, Inc.* (1984), 468 U.S. 641, 104 S.Ct. 3262; *Cincinnati v. Thompson* (1994), 96 Ohio App.3d 7, 643 N.E.2d 1157.

implicates only *intrastate* travel, which, unlike *interstate* travel,[14] has never been officially recognized by the United States Supreme Court as a constitutionally guaranteed fundamental right. These facts would not necessarily end the inquiry, however, as many of the federal circuit courts *have* addressed the question – some holding that intrastate travel is a fundamental right[15] and others holding that it is not.[16] But, given the circumstances of this case, we need not determine whether intrastate travel is a fundamental right because, under either the rational-basis scrutiny appropriate in evaluating impingements on nonfundamental rights or the heightened scrutiny appropriate in evaluating impingements on fundamental rights of this type,[17] Chapter 755's one-year exclusion passes constitutional muster. The city's interest in curbing drug-related activity is significant. And the one-year exclusion from Over-the-Rhine is not only rationally related to this interest, but is a narrowly tailored way of achieving the

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[14] *Shapiro v. Thompson* (1969), 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600; *Memorial Hospital v. Maricopa County* (1974), 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306; *Wardwell v. Board of Education* (C.A.6, 1976), 529 F.2d 625.

[15] See *King v. New Rochelle Mun. Hous. Auth.* (C.A.2, 1971), 442 F.2d 646; *Lutz v. City of York* (C.A.3, 1990), 899 F.2d 255.

[16] *Wardwell*, supra; *Wright v. City of Jackson* (C.A.5, 1975), 506 F.2d 900; *Eldridge v. Bouchard* (W.D.Va.1986), 645 F.Supp. 749, affirmed without opinion, (C.A.4, 1987), 823 F.2d 546.

[17] See *Lutz*, supra (holding that intermediate scrutiny, which permits the imposition of reasonable restrictions on the time, place, and manner of exercising the right to intrastate travel so long as the law is narrowly tailored to meet significant government objectives, is the appropriate test to apply in evaluating impingements on the right of intrastate travel.)

interest. It is limited not only in duration, but also in geographic scope to an area of the city demonstrated to have a significantly higher incidence of drug-abuse-related crimes than other similarly situated or sized areas of the city, and is triggered only when an individual is convicted of a drug-abuse-related crime committed within that specific area.[18] Moreover, the ordinance permits variances from the exclusion to be granted for reasons such as residence or employment in Over-the-Rhine, or for drug-abuse-related counseling services.[19] Accordingly, we reject Burnett's claims that Chapter 755 violates his right to intrastate travel under the United States and Ohio Constitutions.

3. USURPATION OF STATE LEGISLATIVE AUTHORITY

In his final constitutional challenge, Burnett contends that, in enacting Chapter 755, the city has impermissibly usurped the state legislature's authority, as conferred by Article II of the Ohio Constitution, to determine the range of penalties for individuals convicted of crimes. We disagree.

In *State v. James*,[20] the Oregon Court of Appeals reviewed the very drug-exclusion ordinance upon which Chapter 755 is modeled[21] in the context of a double jeopardy challenge and determined that the ordinance's

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[18] See Cincinnnati Municipal Code 755-1 and 755-5.

[19] See Cincinnati Municipal Code 755-11(a)(2).

[20] (1999), 159 Ore.App. 502, 978 P.2d 415.

[21] See preamble to Ordinance No. 229-1996.

exclusion provision did not constitute a criminal penalty but, rather, was a civil sanction.[22] We find the reasoning set forth by the Oregon Court of Appeals to be persuasive. We, therefore, reject Burnett's argument insofar as it is dependent upon characterization of Chapter 755's exclusion as a criminal penalty.

Accordingly, we conclude that the trial court properly overruled Burnett's pretrial motion to dismiss the trespass charge. We, therefore, overrule the second assignment of error.

B. CRIM.R. 29 MOTIONS FOR ACQUITTAL

In his first and third assignments of error, Burnett asserts that the trial court erred in overruling his Crim.R. 29 motion for acquittal made both at the end of the state's case and at the conclusion of all the evidence. He offers two arguments in support of these assignments.

First, he contends that the trial court erred in allowing the state to amend its complaint before ruling on the motion for acquittal made at the end of the state's case. Burnett notes that the state's initial complaint for criminal trespass incorrectly identified the officer who had issued the one-year Notice of Exclusion as the officer who, in fact, had issued the ninety-day exclusion. Given this error, and the fact that the ninety-day exclusion had expired before the date of Burnett's arrest for criminal

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[22] *State v. Cook* (1998), 83 Ohio St.3d 404, 414, 700 N.E.2d 570, 579 (discussing distinction between civil sanction and criminal penalty), certiorari denied, (1999), 525 U.S. 1182, 119 S.Ct. 1122, 143 L.Ed.2d 116.

trespass, Burnett contends that the state's evidence in support of the trespass charge was insufficient as a matter of law to establish that, at the time of his arrest, he was not privileged to enter Over-the-Rhine. For this reason, Burnett argues, the trial court should have granted his Crim.R. 29 motion for acquittal. Instead, he argues, the trial court improperly considered and granted the state's motion to amend its complaint to identify the correct officer who had issued the second notice of exclusion, which was in force at the time of Burnett's arrest. The trial court then denied Burnett's motion. Burnett contends that, so long as his motion for acquittal was pending, the trial court lacked the authority to entertain the state's motion to amend the complaint. We disagree.

Burnett correctly notes that Crim.R. 29(A) prohibits a court from reserving its ruling on a motion for a judgment of acquittal made at the end of the state's case. We are not of the opinion, however, that the trial court's consideration of the state's motion to amend its complaint amounted to the type of "reservation of ruling" contemplated by Crim.R. 29(A). Rather, we believe that Crim.R. 29(A)'s prohibition against reserving rulings is intended to guard against a trial court's failure to rule on the issue of acquittal before the defendant is called upon to present his or her own case.[23] Here, the trial court, after considering the two motions, granted the state's motion and rejected Burnett's. Burnett was not called upon to present his case until after the trial court had

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[23] *See State v. Bumpus* (Oct. 2, 1998), Clark App. No. 97-CA-0110, unreported.

announced its denial of the motion for acquittal. Accordingly, we conclude that the trial court committed no error in entertaining the state's motion.

Furthermore, we conclude that the trial court did not err in granting the state's motion to amend the complaint. The proposed amendment sought only to cure the variation between the complaint and the proof offered at trial by correcting the name of the officer who had issued Burnett's one-year notice of exclusion. The amendment altered neither the name nor the identity of the crime charged.[24] Moreover, given that the state provided Burnett with the documents containing the correct information during pre-trial discovery, and that the state relied on these documents during both the pretrial motion to dismiss and the actual trial of the case, Burnett was neither misled nor prejudiced by the error in the initial complaint.[25]

Finally, we conclude that the trial court properly rejected the motion for acquittal made by Burnett at the end of the state's case. The documentary and testimonial evidence presented by the state demonstrated that on February 25, 1998, he was given notice, pursuant to Chapter 755, that he could not lawfully enter Over-the-Rhine for a period of one year, and that, nevertheless, on June 23, 1998, he was observed by police in that very area. Based on this evidence, the trial court could

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[24] See Crim.R. 7(D).

[25] *Id.*

reasonably have found that Burnett had engaged in criminal trespass.[26]

Burnett also argues that the state's evidence of criminal trespass was insufficient as a matter of law because no evidence of his underlying drug conviction was offered at trial. Burnett appears to argue that, without evidence of this conviction, the state could not prove that he lacked privilege to enter Over-the-Rhine. We disagree.

Burnett was charged with a violation of R.C. 2911.21(A)(3),[27] which requires proof of one's reckless entrance on the land or premises of another, when notice against unauthorized access or presence has been given by actual communication to the offender or in a manner prescribed by law. Contrary to Burnett's contention, proof of his "trespass" was not dependent upon the state's introduction of evidence of his drug conviction. Although that conviction did trigger his exclusion from Over-the-Rhine pursuant to Chapter 755, it was the actual Notice of Exclusion that operated under the criminal trespass statute to deny him the privilege to enter the area. Accordingly, we conclude that the state's evidence, which included the February 1998 Notice of Exclusion issued to Burnett, along with the foundational and authenticating testimony of the officer who had served that notice on

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[26] See *State v. Bridgeman* (1978), 55 Ohio St.2d 261, 381 N.E.2d 184.

[27] Although the state's complaint failed to cite the specific subsection of R.C. 2911.21 that Burnett was charged with violating, because the language of the complaint closely tracked subsection (A)(3), we presume he was charged under that section.

Burnett, as well as the testimony of the police officer who arrested him in Over-the-Rhine for criminal trespass, was sufficient to provide the trial court with a basis for determining that Burnett was guilty of criminal trespass.[28] Therefore, the court correctly overruled Burnett's Crim.R. 29 motions for acquittal.[29]

For these reasons, we overrule the first and third assignments of error.

C. CONCLUSION

For the reasons stated above, we affirm the judgment of the trial court.

Judgment affirmed.

GORMAN, P.J., concurs and PAINTER, J., concurs separately.

PAINTER, J., concurring separately.

I agree with the court's judgment, and the analysis on all issues save one – I would hold that the right to intrastate travel is a constitutional right of Americans.

Intrastate travel is a fundamental right.[30] There is little real-world distinction between the right to *inter*

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[28] See *State v. Shelton* (1989), 63 Ohio App.3d 137, 578 N.E.2d 473 (stating that trespass can be committed on public land); see, also *Athens v. Bromall* (1969), 20 Ohio App.2d 140, 252 N.E.2d 298 (construing "another," as used in R.C. 2901.21, the predecessor to R.C. 2911.21, to include municipal corporations).

[29] See *Bridgeman, supra.*

[30] See, *e.g., Watt v. Watt* (Wyo.1999), 971 P.2d 608, 615; *Minnesota v. Cuypers* (Minn.1997), 559 N.W.2d 435, 437;

state travel, which the United States Supreme Court has recognized as a fundamental right, and the right to *intra* state travel. As the United States Court of Appeals for the Second Circuit has stated, "It would be meaningless to describe the right to travel between states as a fundamental precept of personal liberty and not to acknowledge a correlative constitutional right to travel within a state."[31] Although many federal cases concerning travel among the states are grounded in the Privileges and Immunities Clause,[32] which would necessarily give rise to only a right of interstate travel, the proper fundament for the right of travel within states is the Due Process Clause of the Fourteenth Amendment.[33]

Under the Fourteenth Amendment, substantive due process requires protection of rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental."[34] Under this analysis, intrastate travel is a fundamental right. Indeed, the right of free movement, of

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Brandmiller v. Arreola (1996), 199 Wis.2d 528, 539, 544 N.W.2d 894, 899; *Spencer v. Casavilla* (C.A.2, 1990), 903 F.2d 171, 174 (citing *King v. New Rochelle Mun. Hous. Auth.* [C.A.2, 1971], 442 F.2d 646); *Lutz v. York, Penn.* (C.A.3, 1990), 899 F.2d 255, 268. Although the majority points out that the United States Court of Appeals for the Sixth Circuit has held that there is no fundamental right to intrastate travel, the Sixth Circuit might be reconsidering that position. See *Kuhnle Brothers, Inc. v. County of Geauga* (C.A.6, 1997), 103 F.3d 516, 521-522.

[31] *King, supra,* at 648-649.

[32] Section 2, Article IV, United States Constitution and Section 1, Fourteenth Amendment.

[33] See *Lutz, supra,* at 266-268.

[34] *Snyder v. Massachusetts* (1934), 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674.

walking about from place to place, of deciding which fork in the road to travel, is basic to Americans' understanding of liberty. That a government could tell a free people where they might amble is to us a foreign concept. In *Lutz v. York*, a lead case recognizing a fundamental right to intrastate travel, the United States Court of Appeals for the Third Circuit thoroughly discussed the precedent leading to the conclusion that intrastate travel is a fundamental right.[35] The *Lutz* court recognized the unreasonableness of limiting what it referred to as "the right to travel locally through public spaces and roadways," and it concluded that "the right to move freely about one's neighborhood or town, even by automobile, is indeed 'implicit in the concept of ordered liberty and 'deeply rooted in the Nation's history.' "[36]

Thus, I would hold that intrastate travel is a fundamental right under the Fourteenth Amendment. And it is also grounded in Section 1, Article I of the Ohio Constitution, which guarantees, "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, * * * and seeking and obtaining happiness and safety."[37] The drafters of the Ohio Constitution would have understood that the right to travel free of governmental interference is encompassed in that section.

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[35] 899 F.2d at 266-268.

[36] *Id.* at 268.

[37] See, also, *Brandmiller, supra*, at 539, 544 N.W.2d at 899 (recognizing fundamental right to intrastate travel under Wisconsin Constitution).

Thus, we should subject Cincinnati Municipal Code Chapter 755 to a higher level of scrutiny. Under substantive-due-process analysis, a government impingement upon a fundamental right is subject to heightened scrutiny. Here, the level would be "intermediate scrutiny," which, in the case of intrastate travel, would mean that reasonable restrictions can be placed on the time, place, and manner of exercising the right, if the law is narrowly tailored to meet significant governmental objectives.[38]

But, even under heightened scrutiny, I would nonetheless hold the ordinance to be valid, at least regarding the one-year exclusion based on conviction of an underlying crime. The city's interest in curbing drug-related activity is high. And I believe that the one-year exclusion from Over-the-Rhine is a narrowly tailored way of achieving the city's interests. Persons convicted of crimes are routinely given community-control sanctions that restrict their right to movement, such as by the imposition of curfews or driving restrictions. I believe that restricting access to an area known for high drug usage is reasonable, especially considering that variances to the exclusion can be granted for reasons such as residence or employment in the exclusion zone, or for drug abuse-related counseling services.[39] Therefore, I concur in the court's judgment, but would hold that that intrastate travel is a fundamental right of Americans.

The court has placed of record its own entry in this case on the date of the release of this Opinion.

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[38] See *Lutz, supra,* at 269.

[39] See Cincinnati Municipal Code 755-11(2).

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY

TODAY'S DATE 06/24/98

CASE NO :/98/CRB/23819
CTLNO :420795 TICKET:
City
DEFENDANT :BURNET/GEORGE
SEX : M DOB: 10/18/55

SEC VIOL :2911-21A1 ORCN
CHARGE :TRESPASS-KNOWINGLY M4

DATE OF ARREST:06/23/98

DEF COUNSEL : B. Thompson 23560
PROS. WIT :RHONE/PO

JUDGE: STOCKDALE/DAVID/C

PROB.VIOL _____

CLERK'S OFFICE USE ONLY
Payment Date:_____ Receipt No.:_____
Fine:_____ Cost:_____ Concar:_____
Witness Fees:_____ Jury Fees:_____
Total Paid:_____ Deputy Clerk:_____

DATE	ACTION	SIG. OF JUDGE
(3) 06/24/98 9:30 am	ROOM: JCB ARRAIGNMENT-PROBABLE CAUSE TO HOLD DEMONSTRATED ( )YES ( )NO NG - RAC for trial S.O.R bond w/ cond. Δ stays out of Over the Rhine	ARGN JUDGE: 184 BLACK/TIMOTHY/S Black
	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE AROM 08/04/1998 Pursuant to Provisions of O.R.C. 2945.71 et. seq. extended from 6.24.98 to 8.4.98	
(8) 8.4.98	Cont A.req PT 8-18-98 9:00 ORs	Stockdale
(11) 8.18.98 9/15/98	Defendant to file motion to dismiss by 9/14/98. City to respond by 9/28/98 - 10/2/98 9:00 for hearing on Δ's motion - Δ waives time	Stockdale

over for sentence CMSR1241

App. 51

BEST AVAILABLE COPY

HAMILTON COUNTY MUNICIPAL COURT

JOURNAL ENTRY/MITTIMUS

CASE NO: 98-CRB-23819
CTLNO: 420795 TICKET:
JMS NUMBER:
SEC. VIOL: 2911.21A1
CHARGE: TRESPASS KNOW.
ARREST DATE:
DEFENDANT: BURNETT, George
D.O.B.: 10-24-98
SEX:
DEF. COUNSEL:
PROS. WIT:

JUDGE: STOCKDALE

CLERK'S USE ONLY
ITEM NO:_____
PAYMENT DATE:_____ RECEIPT NO:_____
FINE:_____ COST:_____ CONCAR:_____
WITNESS FEES:_____ JURY FEES:_____
BMV FEE:_____ LIP FEE:_____

TO THE SHERIFF OF HAMILTON COUNTY,GREETINGS: Whereas, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are,therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or,whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
(14) 9-2-98	Continue as scheduled.	
(19) 10-2-98	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE DELL 10/19/1998 MD Entry	
(20) 10-19-98	10/26/98 9:00 D's motion for argument S.B.	
(23) 10-26-98	RAC + trial D's motion denied. SB.	
	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE DHAS 11/09/1998 NJ	
(24) 11-9-98	Cont W's req. RAC	
11/20	/98/CRB/23819 CH174 10:30 AM BURNET/GEORGE DELL 11/20/1998 NJ	
(25) 11-20-98	Witnesses sworn Trial had W#1, 2 admitted. Rule 29 motion	

App. 52

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - **MITTIMUS**

PAGE: 3

CASE: 98 CRB 23819

JUDGE: STOCKDALE

DEFENDANT: Burnett, George

CTLNO: 4207985 TICKET:

PROB. VIOL: _____

SEC. VIOL: 2911.21A1

CHARGE: TRESPASS/NOW.

ARREST DATE: 10-24-98

JMS_NUMBER:

SEX: M D.O.B. 10-18-55

DEF. COUNSEL:

PROS. WIT:

CLERK'S USE ONLY	
INITIALS:	
PAYMENT DATE:	RECEIPT NO:
FINE:	COSTS: CONCAR:
WIT FEES:	JURY FEES: P.D. FEES:
LIP FEE:	BMV FEE: TOTAL PAID

TO THE SHERIFF OF HAMILTON COUNTY, GREETINGS: Where as, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are, therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or, whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore, we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
	Arraignment - Probable cause to hold demonstrated ( ) YES ( ) NO THE BOND SHALL BE $_____ MAY BE AT 10% ( ) YES ( ) NO	
(25) 11-20-98 cont	made. TT's motion to amend complaint to conform to evidence that notice was given by Sgt Irving rather than P.O. Kowalski granted. Rule 29 motion denied. Renewed Motion under Rule 29	Stockdale
	Fined Guilty. 10 Days. CR. Stay on days. 12-23-98 9:00 (S to appeal	Stockdale

App. 53

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - MITTIMUS

CASE: 98-CRB-23819

JUDGE: STOCKDALE

DEFENDANT: BURNETT / GEORGE

CTLNO: 420745 TICKET:

PROB. VIOL: _____

SEC. VIOL: 2911.211
CHARGE: TRESPASS KNOW.

ARREST DATE: 10-24-98
JMS_NUMBER:
SEX: M D.O.B. 10-18-55
DEF. COUNSEL:
PROS. WIT:

CLERK'S USE ONLY
INITIALS: _____
PAYMENT DATE: _____ RECEIPT NO: _____
FINE: _____ COSTS: _____ CONCAR: _____
WIT FEES: ____ JURY FEES: _____ P.D. FEES _____
LIP FEE: _____ BMV FEE: _____ TOTAL PAID _____

TO THE SHERIFF OF HAMILTON COUNTY, GREETINGS: Where as, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are, therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or, whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore, we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
	Arraignment - Probable cause to hold demonstrated ( )YES ( )NO THE BOND SHALL BE $_____ MAY BE AT 10% ( )YES ( )NO	
(29) 12-23-98	Stay pendg appeal	Stockdale

App. 54

The Supreme Court of Ohio

State of Ohio, Appellee,	:	Case No. 00-266
v.	:	RECONSIDERATION ENTRY
George Burnett, Appellant.	:	(Hamilton County)
	:	(Filed Dec. 5, 2001)

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Court of Appeals No. C981003)

/s/ Thomas J. Moyer
THOMAS J. MOYER
Chief Justice

COUNCIL OF THE CITY OF CINCINNATI

STATE OF OHIO

OFFICE OF THE CLERK OF COUNCIL

I HEREBY CERTIFY that the foregoing transcript is correctly copied from the books, papers and journals of the City of Cincinnati, State of Ohio, kept under authority and by the direction of the Council thereof.

ORDINANCE 0229-1996 passed by the Council of the City of Cincinnati at their session on August 07, 1996 entitled:

ORDINANCE submitted by Councilmember Heimlich on 7/1/96, modifying the provisions of Title VII, General Regulations, of the Cincinnati Municipal Code, by ordaining new Chapter 755, Drug-Exclusion Zones, which provides for the use of 90-day and one-year exclusions in designated drug-exclusion zones in the City of Cincinnati, establishes procedures and designates the initial drug-exclusion zone.

IN TESTIMONY WHEREOF I have

[SEAL] hereunto set my name and affixed
the seal of the Clerk of Council
Office this 14th day of
February in the year Two Thousand and Two.

/s/ Jeremy Klein
Jeremy Klein
Deputy Clerk

Doc. #199601603

M.C.V.

City of Cincinnati

An Ordinance No. 229-1996

MODIFYING the provisions of Title VII, General Regulations, of the Cincinnati Municipal Code, by ordaining new Chapter 755, Drug-Exclusion Zones, which provides for the use of 90-day and one-year exclusions in designated drug-exclusion zones in the City of Cincinnati, establishes procedures and designates the initial drug-exclusion zone.

WHEREAS, certain areas of the City have a significantly higher incidence of conduct associated with drug abuse than other areas of the City; and

WHEREAS, the concentration of drug abuse activity contributes to the degradation of those areas and also adversely affects the overall quality of life for those areas' residents, businesses, and visitors; and

WHEREAS, the City has a substantial and compelling interest in restoring the qualify of life and protecting the health, safety and welfare of citizens using the public ways in such areas; and

WHEREAS, the processes presently available were not meant to and do not adequately control the type of activity and the detrimental effects on the areas where drug-abuse activity occurs and alternative methods have been tried and proven ineffective; now, therefore,

BE IT ORDAINED by the Council of the City of Cincinnati, State of Ohio:

Section 1. That Council hereby finds and determines that:

A. Certain areas of the City have a significantly higher incidence of conduct associated with drug abuse activity than other areas of the City. This concentration of illegal drug abuse activity contributes to the degradation of those areas and which also adversely affects the overall quality of life for those areas residents, businesses, and visitors.

B. Many persons arrested in Cincinnati for drug abuse frequently return to the same location or general vicinity of their arrest because the area has proven to be a lucrative place for drug-abuse activity.

C. After arresting persons for illegal drug abuse and/or related crimes, police officers frequently encounter the same persons shortly thereafter in the same area, engaging in the same criminal activity.

D. The city has a substantial and compelling interest in restoring the quality of life and protecting the health, safety, and welfare of citizens using the public ways in such areas. The government has a substantial and compelling interest in allowing the public to use and enjoy the facilities in such areas without interference arising from illegal drug abuse and/or illegal drug abuse related crimes.

E. The processes presently available were not meant to, and do not adequately control this type of activity and the detrimental effects on the areas where it occurs. Alternative methods have been tried and have proven ineffective.

F. Individuals have a significant private interest in being able to travel and associate freely in all areas of the city. However, the public interest in preventing the harmful effects of illegal drug abusers is so great that it justifies excluding those who engage in illegal drug abuse or illegal drug abuse-type criminal activity, for 90 days from impacted areas in which they have engaged in or attempted to engage in illegal drug abuse-related activities. Upon conviction, it having been established in a court of law that the person is a part of the larger problem of illegal drug-abuse related activity in the City, the public interest mandates that the person be excluded for a period of one (1) year from the affected areas.

G. The City's health, safety and welfare would best be served by temporarily excluding from impacted areas those persons who are arrested therein for illegal drug abuse or illegal drug abuse-related activity.

H. To minimize the likelihood of erroneous deprivation, the City should provide persons who are arrested therein for illegal drug abuse or illegal drug abuse-related activity an opportunity to quickly challenge their exclusions and have a timely hearing before a quasi-judicial official before their exclusion from the drug-exclusion zone to preserve their health or well-being.

I. That this Chapter 755 is modeled after similar legislation enacted by the City of Portland, Oregon which has experienced a dramatic decrease in the crime rate in the areas affected by the legislation since the enactment of such.

Section 2. That Chapter 755, Drug-Exclusion Zones, and sections thereunder are hereby ordained to read as follows:

CHAPTER 755. DRUG-EXCLUSION ZONES.

§ 755-1. Drug-Exclusion Zones.

Drug-exclusion zones are those areas of the city as designated by the city council under Chapter 755 of this code, which are areas where the number of arrests for the crimes listed in Section 755-5 and other drug-abuse related crimes for the twelve (12) month period preceding the original designation is significantly higher than that for other similarly situated/sized areas of the city.

§ 755-3. Designation of Drug-Exclusion Zones.

If the city council designates an area meeting the criteria of Section 755-1 of this code to be a drug-exclusion zone, council shall do so by ordinance, said designation to be valid for an initial period of two (2) years. Thereafter, the council may extend the time of designation as it deems appropriate, but in no event shall the total be more than ten (10) years.

The city council may also remove the designation in the event it deems that appropriate. The removal of the designation shall be by ordinance.

§ 755-5. Civil Exclusion.

A person is subject to exclusion for a period of ninety (90) days from the public streets, sidewalks, and other public

ways in all drug-exclusion zones designated in Chapter 755 if that person has been arrested or otherwise taken into custody within any drug-exclusion zone for drug abuse or any drug abuse-related activities including the following crimes:

1. Corrupting another with drugs in violation of Ohio Revised Code Section 2925. 02.
2. Trafficking in drugs in violation of Ohio Revised Code Section 2925.03.
3. Drug abuse in violation of Ohio Revised Code Section 2925.11 (except for a minor misdemeanor violation).
4. Possessing drug abuse instruments in violation of Ohio Revised Code Section 2925.12.
5. Drug paraphernalia offenses in violation of Ohio Revised Code Section 2925.14.
6. Illegal processing of drug documents in violation of Ohio Revised Code Section 2925.23.
7. Abusing harmful intoxicants in violation of Ohio Revised Code Section 2925-31.
8. Trafficking in harmful intoxicants in violation of Ohio Revised Code Section 2925.32.
9. Offenses involving counterfeit controlled substances in violation of Ohio Revised Code Section 2925.37.

Additionally, any person arrested or otherwise taken into custody for any crimes listed above who is subsequently convicted thereof in a court of law for that offense is subject to exclusion for a one (1) year period from the date of such conviction from the public streets, sidewalk,

and other public ways in all drug-exclusion zones designated in Chapter 755.

If a person excluded from a drug-exclusion zone is found therein during the exclusion period, that person is subject to immediate arrest for criminal trespass pursuant to Ohio Revised Code Section 2911.21, a misdemeanor of the fourth degree.

§ 755-7. Issuance of Exclusion Notices.

The chief of police is designated as the person in charge of the public streets, sidewalks, and public ways in drug-exclusion zones for purposes of issuing and directing the service of exclusion notices in accordance with this chapter. The chief of police may authorize employees of the police division to issue exclusion notices in accordance with this chapter.

§ 755-9. Procedures.

At the time a person is arrested within a drug-exclusion zone for any of the crimes listed in Section 755-5, the officer making such arrest may deliver to the person a written notice excluding the person from all drug-exclusion zones. The notice shall specify the areas designated as drug-exclusion zones in Section 755-15 from which that person is excluded and contain information concerning the right to appeal the exclusion notice as provided for under Section 755-11. The exclusion notice shall be personally served upon the excluded person and the person serving said notice shall make written record of such service.

§ 755-11. Appeal and Variance.

The person to whom an exclusion notice is issued shall have a right to an appeal from the issuance of the notice.

1. (a) An appeal of the exclusion must be filed, in writing, with the director of safety within five (5) calendar days of the issuance of the notice. A hearing on the appeal shall be had to the safety director or the safety director's designee, as provided in Section 755-13.

   (b) The exclusion shall not take effect during the pendency of the appeal. If no appeal is taken the exclusion shall take effect on the sixth calendar day after the issuance of the notice.

   (c) The city shall have the burden to show by a preponderance of the evidence that the exclusion is based on conduct which constitutes any of the crimes enumerated in Section 755-5. Copies of documents in its control and which are intended to be used by the city at the hearing shall be made available to the appellant at least two (2) days prior to the hearing.

2. (a) A judgment of conviction for violation of Ohio Revised Code Sections 2925.02, 2925.03, 2925.11, 2925.12, 2925.14, 2925.23, 2925.31 2925.32, 2925-37, or a determination by a court having jurisdiction of the matter, that the officer who issued the exclusion notice, at the time, had probable cause to arrest the person to whom the exclusion notice

was issued for violation of such crimes, shall be *prima facie* evidence that the exclusion was based on conduct proscribed by those statutes.

(b) Variances from an exclusion may be granted at any time during the exclusion period by either the chief of police or designate or by a social service agency which provides services within the drug-exclusion zones for which the variance is granted, only for reasons relating to the health, welfare, or well-being of the person excluded, or for drug abuse-related counseling services. Only those social service agencies which have written rules and regulations prohibiting drug abuse-related activities by their clients and which have entered into a written agreement with the police division concerning the applicability and enforceability of those rules are eligible to grant variances. The chief of police shall grant a variance to any person who can establish that he or she:

I. Was a bona fide resident of the drug-exclusion zone, other than transient occupancy in a hotel or motel, prior to receipt of the exclusion notice; or

ii. Was a bona fide owner, principal or employee of a place of lawful employment located in one of the designated drug-exclusion zones.

(c) All variances shall be in writing, for a specific period and only to accommodate a specific purpose, all of which shall be stated on the variance. The person shall keep the variance on his or her person at all times the person is within the drug-exclusion zone. In the event a person having a variance is found to be outside the scope of the terms of the variance, the variance shall immediately become void and that person is thereupon subject to arrest for trespass.

(d) In the event a person holding a variance is arrested for conduct prohibited by state or federal law involving a drug abuse-related activity, the variance shall immediate [sic] become void and that person shall be ineligible for any variance for a period of one (1) year from the date of the arrest.

§ 755-13. Procedure for Appeals.

A. Initiation of Appeal.

The request for an appeal hearing shall be in writing and shall contain either a copy of, or a full and complete description of the exclusion notice appealed from and a statement of grounds upon which it is contended that the exclusion notice is invalid, unauthorized is invalid, unauthorized, or otherwise improper, together with such other information as the safety director, or the safety director's designee, may by rule require. The safety director, or the safety director's designee, may specify and

provide hearing request forms to be used by persons requesting hearings.

B. Hearings.

(a) Upon receipt of a request for hearing, the safety director or the safety director's designee, shall schedule and hold an appeal hearing within thirty (30) days after the receipt of such request.

(b) Notice of the time, date, and place of hearing shall be given to the person requesting the hearing and to the safety department. The safety director or the safety director's designee may provide by rule for the manner of providing notice to such persons which shall be either: (1) personally delivering the notice to the person appealing the exclusion notice, or (2) mailing the notice certified mail by United States mail, postage prepaid, return receipt requested addressed to the residence or business address of the person appealing.

(c) The time for hearing may be extended by the safety director or the safety director's designee for good cause shown, upon such terms and conditions as the safety director or the safety director's designee shall deem just and appropriate.

C. Hearings Procedure.

(a) Hearings shall be conducted in accordance with the procedures set forth in this Section 755-13.

(b) With consent of all parties, the safety director or the safety director's designee may determine the matter without hearing upon the record.

(c) The safety director or the safety director's designee may sustain or vacate the exclusion notice appealed from.

D. Nature of Determination.

The determination of the safety director or the safety director's designee is a quasi-judicial decision and is final subject only to appeal to a court of competent jurisdiction.

E. Notice; Rights; Procedure.

(a) Prior to the commencement of a contested hearing, the safety director or the safety director's designee shall inform each party to the hearing of the following matters:

(1) A general description of the hearing procedure including the order of presentation of evidence, what kinds of evidence are admissible, whether objections any be made to the introduction of evidence and what kind of objections may be made, and an explanation of the burdens of proof or burdens going forward with the evidence.

(2) That a record will be made of the proceedings and the manner of making the record and its availability to the parties.

(3) The function of the record-making with respect to the perpetuation of the testimony and evidence and with respect to any appeal from the determination or order of the safety director or the safety director's designee.

(4) Whether an attorney will represent the city in the matters to be heard and whether the parties ordinarily and customarily are represented by an attorney.

(5) The title and function of the safety director or the safety director's designee, including the effect and authority of the safety director or the safety director's designee's determination.

(6) In the event a party is not represented by an attorney, whether the party may, during the course of proceedings, request a recess if at that point the party determines that representation by an attorney is necessary to the protection of the party's rights.

(7) Whether there exists an opportunity for an adjournment at the end of the party then determines that additional evidence should be brought to the attention of the safety director or the safety director's designee and the hearing is reopened.

(8) Whether there exists an opportunity after the hearing and prior to the final determination or order of the safety director or the safety director's designee to review and object to any proposed ruling.

(9) A description of the appeal or judicial review process from the determination or order of the safety director or the safety director's designee.

(b) The information required to be given to a party to a hearing under subsection (a) of this section may be given in writing or orally before commencement of the hearing.

(c) The failure to give notice of any item specified in subsection (a) of this section shall not invalidate any

determination or order of the safety director or the safety director's designee unless on appeal from or review of the determination or order a court finds that the failure affects the substantive rights of the complaining party, in the event of such a finding, the court shall remand the matter to the safety director or the safety director's designee for a reopening of the hearing and shall direct the safety director or the safety director's designee as to what steps shall be taken to remedy the prejudice to the rights of the complaining party.

F. Procedure.

(a) Unless precluded by law, informal disposition of any proceeding may be made, with or without a hearing by stipulation, consent order, agreed settlement, or default.

(b) Parties may elect to be represented by counsel and to respond to and present evidence, testimonial or otherwise, and argument on all issues involved.

(c) An order adverse to a party may be issued upon default only upon a prima facie case made on the record before the safety director or the safety director's designee.

(d) Testimony shall be taken upon oath or affirmation of the witness from whom received. The safety director or the safety director's designee may administer oaths or affirmations to witnesses.

(e) The record in a proceeding before the safety director or the safety director's designee shall include:

(1) All pleadings, motions, and intermediate rulings;

(2) evidence received or considered;

(3) stipulations;

(4) a statement of matters officially noticed;

(5) questions and offers of proof, objections, and rulings thereon;

(6) proposed findings, and exceptions; and

(7) any proposed, intermediate, or final order prepared by the safety director or the safety director's designee.

(f) A verbatim, written, mechanical, or electronic record shall be made on all motions, rulings, and testimony. The record shall be transcribed for the purposes of court review unless the parties to such review waive the transcript.

G. Evidence.

(a) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded. Erroneous rulings on evidence shall not preclude action by the safety director or the safety director's designee on the record unless shown to have substantially prejudiced the rights of a party. All other evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible. The safety director or the safety director's designee shall give effect to the rules of privilege recognized by law. Objections to evidence may be received in written form.

(b) All evidence shall be offered and made a part of the record in the case, and except for matters stipulated to and except as provided in subsection (d) of this section, no other factual information or evidence shall be considered in the determination of the case. Documentary evidence may be received in the form of copies of excerpts, or by incorporation by reference. The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position.

(c) Every party shall have the right of cross-examination of witnesses who testify and shall have the right to submit rebuttal evidence.

(d) The safety director or the safety director's designee may take notice of judicially recognizable facts, and the safety director or the safety director's designee may take official notice of general, technical, or scientific facts within the specialized knowledge of city employees. Parties shall be notified at any time during the proceeding, but in any event prior to the final decision, of material officially noticed and they shall be afforded an opportunity to contest the facts so noticed.

H. Decision.

Within 48-hours from the close of the hearing the safety director or the safety director's designee shall render a decision in writing. The decision is final subject to appeal to a court of competent jurisdiction or reconsideration.

I. Petitions for Reconsideration, Rehearing.

(a) A party may file a petition for reconsideration or rehearing on a final order with the safety director or the safety director's designee within thirty (30) days after the order is mailed.

(b) The petition shall set forth the specific ground or grounds for requesting the reconsideration or rehearing. The petition may be supported by written argument.

(c) The safety director or the safety director's designee may grant a request for reconsideration if good and sufficient reason therefor appears. If the petition is granted, an amended order shall be issued.

(d) The safety director or the safety director's designee may grant a hearing petition if good and sufficient reason therefor appears. The rehearing may be limited by the safety director or the safety director's designee to specific matters. If a rehearing is held, an amended order may be issued.

(e) The safety director or the safety director's designee, at any time, and upon a showing of due diligence, may set aside, modify, vacate, or stay any final order, or re-open any proceeding for additional hearing when necessary to prevent a clear and manifest injustice to a party or other person adversely affected by such order.

§ 753-15. Listing of Drug-Exclusion Zone.

Pursuant to Chapter 755, the following is a drug-exclusion zone:

Over-the-Rhine:

Beginning at a point in the center line of Central Parkway, said point being the point of intersection with the center line of Vine Street; thence westwardly with the center line of West Central Parkway a distance of 1394.5 feet to the point of intersection with the center line of Central Parkway; thence northwardly and northwestwardly with the center line of Central Parkway to the point of intersection with the westwardly extension of the north parcel line of Parcel 92 Plat Book 98 Page 5 HCAP; thence eastwardly along said parcel line extended, said parcel line and said line extended to the center line of Fargo Alley; thence southwardly with said center line to the point of intersection with the westwardly extension of the north parcel line of Parcel 204 Plat Book 98 Page 5 HCAP; thence eastwardly along said parcel line extended, said parcel line and said line extended to the center line of McMicken Avenue; thence southwardly with said center line to the point of intersection with the center line of Warner Street; thence eastwardly with the center line of Warner Street to the point of intersection with the northwardly extension of the east parcel line of Parcel 43 Plat Book 97 Page 1 HCAP; thence southwardly along said parcel line extended and said parcel line and continuing along the east parcel line of Parcels 44, 45, 46 and 47 Plat Book 97 Page 1 HCAP to the north parcel line of Parcel 52 Plat Book 97 Page 1 HCAP; thence eastwardly along said parcel line to the northeast corner of said parcel; thence southwardly along the east parcel line of said parcel 52 and continuing along the east parcel line of Parcels 53, 54, 55 and 58 Plat Book 97 Page 1 HCAP to the southeast corner of

said parcel 58; thence westwardly along the south parcel line of said parcel to the northeast corner of Parcel 59 Plat Book 97 Page 1 HCAP; thence southwardly along the east parcel line of said parcel and continuing along the east parcel line of Parcels 60, 61, 62, 63 and 68 Plat Book 97 Page 1 HCAP to the north parcel line of Parcel 69 Plat Book 97 Page 1 HCAP; thence eastwardly along said parcel line to the northeast corner of said parcel; thence southwardly along the east parcel line of said parcel 69 to the southeast corner of said parcel; thence westwardly along the south parcel line of said parcel to the northeast corner of Parcel 70 Plat Book 97 Page 1 HCAP; thence southwardly along the est [sic] parcel line of said parcel to the north parcel line of Parcel 221 Plat Book 97 Page 1 HCAP; thence eastwardly along said parcel line to the northeast corner of said parcel; thence southwardly along the east parcel line of said parcel 221 and continuing along the east parcel line of Parcels 75, 81 and 82 Plat Book 97 Page 1 HCAP to the north parcel line of Parcel 88 Plat Book 97 Page 1 HCAP; thence eastwardly along said parcel line and continuing along the north right-of-way line of Emming Street to the point of intersection with the center line of said street; thence eastwardly with said center line to the point of intersection with the northwardly extension of the east parcel line of Parcel 10 Plat Book 97 Page 2 HCAP; thence southwardly along said parcel line extended and said parcel line to the north right-of-way line of Conroy Alley; thence eastwardly along said right-of-way line to the west parcel line of Parcel 108 Plat Book 96 Page 3 HCAP; thence northwardly along said parcel line to the northwest corner of said parcel;

thence eastwardly along the north parcel line of said parcel 108 and said parcel line extended to the center line of Ravine Street; thence southwardly with said center line to the point of intersection with the center line of Klotter Avenue; thence eastwardly with the center line of Klotter Avenue to the point of intersection with the center line of Renner Street; thence southwardly and southeastwardly with the center line of Renner Street to the point of intersection with the southwestwardly extension of the northwest parcel line of Parcel 51 Plat Book 96 Page 4 HCAP; thence northeastwardly along said parcel line extended and said parcel line to the north corner of said parcel; thence southeastwardly along the northeast parcel line of said parcel 51 and continuing along the northeast parcel line of Parcels 52, 53, and 54 Plat Book 96 Page 4 HCAP and said parcel line extended of said parcel 54 to the north corner of Parcel 73 Plat Book 96 Page 4 HCAP; thence southeastwardly along the northeast parcel line of said parcel and continuing along the northeast parcel line of Parcels 75, 76, 77 and 78 Plat Book 96 Page 4 HCAP to the northwest parcel line of Parcel 79 Plat Book 96 Page 4 HCAP; thence northeastwardly along said parcel line and continuing along the west terminus of Zier Street to the north right-of-way line of said street; thence eastwardly along said right-of-way line to the west right-of-way line of Clifton Avenue; thence eastwardly to a point, said point being the point of intersection of the center line of Clifton Avenue with the center line of West Clifton Avenue; thence southeastwardly with the center line of West Clifton Avenue to the point of intersection with the southwestwardly extension of the

northwest parcel line of Parcel 6 Plat Book 95 Page 5 HCAP; thence northeastwardly along said parcel line extended and said parcel line and continuing along the west terminus of Kirk Alley and the northwest parcel line of Parcels 13, 14, 15, 16 and 17 Plat Book 95 Page 5 HCAP to the north corner of said parcel 17; thence southeastwardly along the northeast parcel line of said parcel and said line extended to the center line of Ohio Avenue; thence southwestwardly with the center line to the point of intersection with the center line of West Clifton Avenue; thence southeastwardly with the center line of West Clifton Avenue to the point of intersection with the center line extended of Peete Street; thence eastwardly and southwardly with said center line extended and said center line to the point of intersection with the center line of Main Street; thence southwardly with the center line of Main Street to the point of intersection with the center line of East Liberty Street; thence eastwardly with the center line of East Liberty Street to the point of intersection with the center line of Reading Road; thence southwestwardly and westwardly with the center line of Reading Road to the point of intersection with the center line of East Central Parkway; thence westwardly with the center line of East Central Parkway to the point of intersection with the center line of Vine Street and the place of beginning.

§ 755-17. Severability.

If it is determined by a proper legal authority that any section or part thereof of this Chapter 755 is unconstitutional or otherwise invalid, the remaining sections

and parts thereof shall remain in full force and effect and be unaffected by such determination.

Section 3. This ordinance shall be in force and effect from and after the earliest period allowed by law.

Passed August 7A.D., 1996

/s/ Roxanne Qualls
Mayor

Attest: Sandy L. Sherman
Clerk

I HEREBY CERTIFY THAT
ORDINANCE NO. 229 1996 WAS
PUBLISHED IN THE CITY BULLETIN
IN ACCORDANCE WITH THE
CHARTER ON 8-20-96.

/s/ Sandy L. Sherman
Clerk of Council.

COUNCIL OF THE CITY OF CINCINNATI

STATE OF OHIO

OFFICE OF THE CLERK OF COUNCIL

I HEREBY CERTIFY that the foregoing transcript is correctly copied from the books, papers and journals of the City of Cincinnati, State of Ohio, kept under authority and by the direction of the Council thereof.

ORDINANCE 0304-1998 passed by the Council of the City of Cincinnati at their session on September 02, 1998 entitled:

ORDINANCE (emergency) submitted by Kent A. Ryan, Director of Safety, on 8/5/98 extending the drug-exclusion zone designation for the Over-the-Rhine neighborhood described in Chapter 755, Drug-Exclusion Zones for an additional two years and modifying the provisions of Chapter 755 of the Cincinnati Municipal Code by amending Section 755-5, Civil Exclusion to provide for the termination of the 90-day exclusion upon the dismissal of the charges, acquittal of the person excluded, or the failure to prosecute.

[SEAL] IN TESTIMONY WHEREOF I have hereunto set my name and affixed the seal of the Clerk of Council Office this 14th day of February in the year Two Thousand and Two.

/s/ Jeremy Klein
Jeremy Klein
Deputy Clerk

EMERGENCY

City of Cincinnati

M.C.V.

An Ordinance No. 304-1998

EXTENDING the prostitution-exclusion zone designation for the Over-the-Rhine neighborhood described in Chapter 755, Drug-Exclusion Zones for an additional two years and modifying the provisions of Chapter 755 of the Cincinnati Municipal Code by amending Section 755-5, Civil Exclusion to provide for the termination of the 90-day exclusion upon the dismissal of the charges, acquittal of the person excluded, or the failure to prosecute.

WHEREAS, on August 7, 1996, City Council with the enactment of Chapter 755, Drug-Exclusion Zones of the Cincinnati Municipal Code designated the Over-the-Rhine neighborhood as a drug-exclusion zone for an initial period of two years; and

WHEREAS, that initial period of time will expire in the near future, unless pursuant to Section 755-3, City Council by ordinance extends such drug-exclusion zone designation for the Over-the-Rhine neighborhood; and

WHEREAS, the City administration has analyzed the results of the prostitution-exclusion zone legislation and determined that such is an effective crime fighting tool and has recommended the extension of such drug-exclusion zone designation for the Over-the-Rhine neighborhood; and

WHEREAS, Council wishes to provide for the immediate termination of the 90-day exclusion contained in

Section 755-5 upon the acquittal or other favorable disposition of the criminal charges against the person excluded; now, therefore,

BE IT ORDAINED by the Council of the City of Cincinnati, State of Ohio:

Section 1. That City Council, pursuant to Section 755-3 of the Cincinnati Municipal Code, hereby extends the designation of the Over-the-Rhine neighborhood as a drug-exclusion zone for an additional two years from and after the effective date of this ordinance.

Section 2. That Section 755-5 of the Cincinnati Municipal Code is hereby amended as follows:

§ 755-5. Civil Exclusion.

A person is subject to exclusion for a period of ninety (90) days from the public streets, sidewalks, and other public ways in all drug-exclusion zones designated in Chapter 755 if that person has been arrested or otherwise taken into custody within any drug-exclusion zone for drug abuse or any drug abuse-related activities including the following crimes:

1. Corrupting another with drugs in violation of Ohio Revised Code Section 2925.02.

2. Trafficking in drugs in violation of Ohio Revised Code Section 2925.03.

3. Drug abuse in violation of Ohio Revised Code Section 2925.11 (except for a minor misdemeanor violation).

4. Possessing drug abuse instruments in violation of Ohio Revised Code Section 2925.12.

5. Drug paraphernalia offenses in violation of Ohio Revised Code Section 2925.14.

6. Illegal processing of drug documents in violation of Ohio Revised Code Section 2925.23.

7. Abusing harmful intoxicants in violation of Ohio Revised Code Section 2925.31.

8. Trafficking in harmful intoxicants in violation of Ohio Revised Code Section 2925.32.

9. Offenses involving counterfeit controlled substances in violation of Ohio Revised Code Section 2925.37.

The aforesaid 90-day exclusion will cease immediately if the person arrested or otherwise taken into custody for the crimes listed above is subsequently acquitted of the charge(s), said, charge(s) is/are dismissed, or the charge(s) is/are no longer being pursued by law enforcement.

Additionally, any person arrested or otherwise taken into custody for any crimes listed above who is subsequently convicted thereof in a court of law for that offense is subject to exclusion for a one (1) year period from the date of such conviction from the public streets, sidewalk, and other public ways in all drug-exclusion zones designated in Chapter 755.

If a person excluded from a drug-exclusion zone is found therein during the exclusion period, that person is

subject to immediate arrest for criminal trespass pursuant to Ohio Revised Code Section 2911.21, a misdemeanor of the fourth degree.

Section 3. That existing Section 755-5 of the Cincinnati Municipal Code is hereby repealed.

Section 4. That this ordinance is hereby declared to be an emergency measure necessary for the preservation of the public peace, health and safety and shall go into effect forthwith. The reason for said emergency is to extend the drug-exclusion zone designation for the Over-the-Rhine neighborhood before its expiration.

Passed September 2, 1998

/s/ Roxanne Qualls
Mayor

Attest: Sandy L. Sherman
Clerk

New wording has been underscored.

I HEREBY CERTIFY THAT
ORDINANCE NO. 304 1998 WAS
PUBLISHED IN THE CITY BULLETIN
IN ACCORDANCE WITH THE
CHARTER ON 10-15-98.

/s/ Sandy L. Sherman
Clerk of Council.

Supreme Court U.S.
FILED
MAR 28 2002
OFFICE OF THE CLERK

(2)

No. 01-1235

In The

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

GEORGE BURNETT,

Respondent.

On Petition For A Writ Of Certiorari To The Ohio Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

H. FRED HOEFLE
(Counsel of Record)

BRUCE F. THOMPSON
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Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4pp
5f/o

STATEMENT OF THE CASE

In 1996 the City of Cincinnati, through the City Council, enacted Ordinance No. 229-1996, codified as Chapter 755, Cincinnati Municipal Code, Drug Exclusion Zones. The city ordinance authorizes the exclusion of individuals from a large area of the city for 90 days after arrest and/or one year after conviction for specified drug crimes. The ordinance provides an administrative appeal and variance procedure through the Police Department.

Respondent, George Burnett, was arrested on February 7, 1998, and was charged with possessing drug paraphernalia, one of the specified drug crimes in Chapter 755, and given notice of the 90 day exclusion. After his conviction on this charge, the city, outside of the court proceedings, immediately gave the Respondent notice of his one year exclusion from the "exclusion zone." On June 23, 1998, the Respondent was found in the "exclusion zone" and arrested for criminal trespass, a violation of the Ohio Revised Code. Respondent pled not guilty and filed a Motion to Dismiss on state and federal constitutional grounds. His motion to dismiss was denied and, after trial to the Court, he was convicted of criminal trespass and appropriately sentenced, with a stay being granted for appeal.

The Respondent appealed his conviction to the Ohio Court of Appeals, First Appellate District, which affirmed the conviction. He then appealed to the Supreme Court of Ohio, which after argument, reversed the conviction and declared Cincinnati Municipal Code Chapter 755 unconstitutional under the United States Constitution and the Ohio Constitution. On October 18, 2001, the Trial Court,

in this matter, dismissed the charge against Mr. Burnett on the basis of the decision of the Supreme Court of Ohio. (see attached certified judge's journal entry) No appeal has been taken from this dismissal.

REASONS FOR DENYING THE PETITION

I. REVIEW SHOUD BE DENIED BECAUSE THIS COURT WILL NOT REVIEW A QUESTION OF FEDERAL LAW BY A STATE COURT IF THE DECISION OF THAT COURT RESTS ON STATE LAW GROUND THAT IS INDEPENDENT OF THE FEDERAL QUESTION AND ADEQUATE TO SUPPORT JUDGMENT.

In the context of a direct review of a state court judgment, independent and adequate state ground doctrine is jurisdictional, because the Supreme Court has no power to review a state law determination that is sufficient to support judgment, where resolution of any independent federal ground for the decision could not attest judgment and would therefore be advisory. *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). The Supreme Court of Ohio, in this case, held Chapter 755 of the Cincinnati Municipal Code to be unconstitutional as a violation of Section 3, Article XVIII of the Ohio Constitution. This Article of the Ohio Constitution provides the authority under which municipalities, such as Cincinnati, are permitted to operate. The Supreme Court of Ohio ruled that Chapter 755 exceeded the authority granted to municipalities and was, therefore, unconstitutional under the Ohio Constitution. Where the judgment of the state court rests on two

grounds, one of which is federal and the other nonfederal in character, the Supreme Court will not undertake to review the decision, if the state court decision indicates clearly and expressly that it is based on bona fide separate, adequate, and independent grounds. *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983); *Fox Film Corporation v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935) as there is separate, adequate, and independent grounds for the state court's decision under the Ohio Constitution, the Supreme Court jurisdiction and review should not be granted.

II. REVIEW SHOULD BE DENIED BECAUSE THIS COURT DOES NOT GIVE ADVISORY OPINIONS.

The matter on which this Petition is based ceased to be an actual controversy on October 18, 2001, when the trial court dismissed the charge against the defendant and no timely appeal of that decision was undertaken. The Supreme Court does not have the power to give advisory opinion. *Ashwander et al. v. Tennessee Valley Authority et al.*, 297 U.S. 288, 56 S.Ct. 466, 80 L.Ed. 688 (1936). Thus the Supreme Court has no authority to review this case.

CONCLUSION

The petitioner presents no reason for the Court to accept his petition that would make this other than advisory opinion as the case was decided on independent state constitutional grounds and has been dismissed by the trial court. Therefore, this Petition must be denied.

Dated this 27th day of March, 2002.

Respectfully submitted,

H. Fred Hoefle
Bruce F. Thompson
Hamilton County Public
Defenders Office
230 E. Ninth Street, 2nd Floor
Cincinnati, Ohio 45202
Telephone: (513) 946-3673
Facsimile: (513) 346-3707

Attorneys for Respondent

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - MITTIMUS

PAGE: 5

CASE: 98CRB 23819

JUDGE:

DEFENDANT: Burnett / George

CTLNO: 420795 TICKET:

PROB. VIOL: _____

SEC. VIOL: 2911.21A1
CHARGE: Trespass

CLERK'S USE ONLY
INITIALS: _____
PAYMENT DATE: _____ RECEIPT NO: _____
FINE: _____ COSTS: _____ CONCAR: _____
WIT FEES: ____ JURY FEES: _____ P.D. FEES _____
LIP FEE: _____ BMV FEE: _____ TOTAL PAID _____

ARREST DATE:
JMS_NUMBER:
SEX: D.O.B.
DEF. COUNSEL:
PROS. WIT:

App. 1

TO THE SHERIFF OF HAMILTON COUNTY, GREETINGS: Where as, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are, therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or, whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore, we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
6/15/2000	Arraignment - Probable cause to hold demonstrated ( ) YES ( ) NO THE BOND SHALL BE $_____ MAY BE AT 10% ( ) YES ( ) NO	
	Cont stay pendy appeal	
12-15-00	Cont stay pendy appeal	
06-15-01	Cont. stay pendy appeal	
10-18-01	The judgment of the court of appeals having been reversed by the Supreme Court, the ordinance pro-hibiting the defendant from being on the property having been found unconstitutional the fundy and sentence are vacated and the charge is dismissed.	

I, James Cissell, Clerk of the Hamilton County Municipal Court, Hamilton County, Ohio, certify that this is a true and correct copy of the original filed in this office.
By _____ Deputy Clerk

190

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - **MITTIMUS**

CASE: 98-CRB-23819 JUDGE: STOCKDALE

DEFENDANT: BURNETT / GEORGE

CTLNO: 420795 TICKET: PROB. VIOL: _____

SEC. VIOL: 2911.21A1
CHARGE: TRESPASS KNOW.

ARREST DATE: 10-24-98
JMS_NUMBER:
SEX: M D.O.B. 10-18-55
DEF. COUNSEL:
PROS. WIT:

CLERK'S USE ONLY
INITIALS: _____
PAYMENT DATE: _____ RECEIPT NO: _____
FINE: _____ COSTS: _____ CONCAR: _____
WIT FEES: ____ JURY FEES: _____ P.D. FEES _____
LIP FEE: _____ BMV FEE: _____ TOTAL PAID _____

App. 2

TO THE SHERIFF OF HAMILTON COUNTY, GREETINGS; Where as, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are, therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or, whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore, we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
	Arraignment - Probable cause to hold demonstrated ( )YES ( )NO THE BOND SHALL BE $_____ MAY BE AT 10% ( )YES ( )NO	
12-23-98	Stay pendy appeal	Stockdale
6-23-99	Stay Pendy appeal	Stockdale
12-23-99	RAC ~~from~~ 1-20-00 9:00 for stay on sentence - please notify PD Bruce Thompson	Stockdale
1.20.00	Continue stay pendny appeal to Supreme Court	Stockdale

I, James Cissell, Clerk of the Hamilton County Municipal Court, Hamilton County, Ohio, hereby certify the above to be a true and correct copy of the original.

By _____ Deputy Court Clerk

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - **MITTIMUS**

CASE: 98 CRB 23819 JUDGE: STOCKDALE

DEFENDANT: Burnett, George

CTLNO: 420795 TICKET:

PROB. VIOL: _____

SEC. VIOL: 2911.21A1

CHARGE: TRESPASSING

ARREST DATE: 10-24-98

JMS_NUMBER:

SEX: M D.O.B. 10-18-55

DEF. COUNSEL:

PROS. WIT:

CLERK'S USE ONLY
INITIALS: _____
PAYMENT DATE: _____ RECEIPT NO: _____
FINE: _____ COSTS: _____ CONCAR: _____
WIT FEES: _____ JURY FEES: _____ P.D. FEES: _____
LIP FEE: _____ BMV FEE: _____ TOTAL PAID _____

TO THE SHERIFF OF HAMILTON COUNTY, GREETINGS: Where as, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are, therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or, whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore, we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
	Arraignment - Probable cause to hold demonstrated ( ) YES ( ) NO THE BOND SHALL BE $_____ MAY BE AT 10% ( ) YES ( ) NO	
11-20-98 cont	Made. It's motion to amend complaint to conform to evidence that notice was given by Sgt Irving rather than P.O. Kowalski granted. Rule 29 motion denied. Renewed Motion under Rule 29	Stockdale
	Found Guilty. 10 days. CR. Stay on days. 12-23-98 9:00 (S to appeal	Stockdale

I, James Cissell, Clerk of the Municipal Court, Hamilton County, Ohio, hereby certify the above to be a true and correct copy of the original.

E [illegible]

App. 3

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY/**MITTIMUS**

CASE NO: 98-CRB-23819
CTLNO: 420795 TICKET:
JMS NUMBER:
SEC. VIOL: 2911.21A1
CHARGE: TRESPAS IKNOW.
ARREST DATE:
DEFENDANT: BURNETT, George
10-24-98
SEX: D.O.B.:
DEF. COUNSEL:
PROS. WIT:

JUDGE: STOCKDALE

CLERK'S USE ONLY
ITEM NO:_____
PAYMENT DATE:_____ RECEIPT NO:_____
FINE:_____ COST:_____ CONCAR:_____
WITNESS FEES:_____ JURY FEES:_____
BMV FEE:_____ LIP FEE:_____

TO THE SHERIFF OF HAMILTON COUNTY,GREETINGS: Whereas, the above defendant was arrested and charged with the above section number. For good cause shown, the defendant is ordered to give bail in the sum indicated below. You are,therefore, commanded to receive the defendant into your custody until the trial date, or until he/she gives bail as ordered. Or,whereas, the above defendant, having been tried and convicted of said charge(s) is sentenced, as indicated below. Therefore we command you to receive the defendant into your custody, there to remain until he/she has fully executed the terms of the sentence, or until otherwise discharged by due course of law.

DATE	ACTION	SIGNATURE OF JUDGE
10-2-98	Continue as scheduled.	
10-2-98	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE DELL 10/19/1998 MD Entry	
10-19-98	10/26/98 9:00 D's motion for argument S.B.	
10-26-98	RAC + trial D's motion denied. SB.	
	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE DHAS 11/09/1998 NJ	
11-9-98	Cont ptys req RAC	
11/20	/98/CRB/23819 CH174 10:30 AM BURNET/GEORGE DELL 11/20/1998 NJ	
11-20-98	Witnesses sworn trial had ptx 1, 2 admitted. Rule 29 motion	

App. 4

HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY

TODAY'S DATE 06/24/98

CASE NO :/98/CRB/23819
CTLNO :420795 TICKET:
City
DEFENDANT :BURNET/GEORGE
SEX : M DOB: 10/18/55

SEC VIOL :2911-21A1 ORCN
CHARGE :TRESPASS-KNOWINGLY M4

DATE OF ARREST:06/23/98

DEF COUNSEL : B. Thompson 23560
PROS. WIT :RHONE/PO

JUDGE: STOCKDALE/DAVID/C

PROB.VIOL _____

CLERK'S OFFICE USE ONLY
Payment Date:_____Receipt No.:_____
Fine:_____Cost:_____Concar:_____
Witness Fees:_____Jury Fees:_____
Total Paid:_____Deputy Clerk:_____

DATE	ACTION	SIG. OF JUDGE
06/24/98 9:30 am	ROOM: JCB ARRAIGNMENT-PROBABLE CAUSE TO HOLD DEMONSTRATED ( )YES ( )NO	ARGN JUDGE: 184 BLACK/TIMOTHY/S
	NG - RAC for trial S.O.R bond w/ cond. Δ stays out of over the Rhine	Black
	/98/CRB/23819 CH174 9:00 AM BURNET/GEORGE AROM 08/04/1998 Time Provisions of O.R.C. 2945.71 et. seq. extended from 6.24.98 to 8.4.98	
8.4.98	Cont Arrg PT 8-18-98 9:00	Stockdale
	ORs	
8.18.98	Defendant to file motion to dismiss	E Rhone
9/15/98	by 9/14/98. City to respond by 9/28/98 - 10/2/98 9:00 for hearing on Δ's motion - Δ waives time	Stockdale

over for sentence CMSR1241

App. 5

Supreme Court, U.S.
FILED
APR 5 2002
OFFICE OF THE CLERK

(3)

No. 01-1235

In The

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

GEORGE BURNETT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

FAY D. DUPUIS
City Solicitor

RICHARD GANULIN
Assistant City Solicitor
Counsel of Record

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COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I. THERE IS NO ADEQUATE AND INDEPENDENT STATE LAW GROUND FOR THE DECISION OF THE SUPREME COURT OF OHIO

The respondent suggested in his Brief in Opposition that there was an independent state law ground for the decision of the Supreme Court of Ohio. As explained in the Petition for a Writ of Certiorari (pp. 12-16), the purported state law ground is interwoven with federal law and the adequacy and independence of the state law ground is not clear. In fact, the purported state law ground is a federal double jeopardy analysis, in disguise. This Court, therefore, has jurisdiction.

II. THIS CASE IS NOT MOOT BECAUSE THE TRIAL COURT WAS WITHOUT JURISDICTION TO DISMISS THE CRIMINAL PROSECUTION WHILE THE CASE WAS ON APPEAL

The respondent claims that the trial court dismissed the underlying criminal charge on October 18, 2001, just one day after the October 17, 2001, decision of the Supreme Court of Ohio, and while the City's time to appeal had just started to run. This is the first notice the City has received of the trial court's action. Obviously, the trial court was without jurisdiction to *sua sponte*, and without notice to the City, dismiss the underlying criminal charge while the City was seeking reconsideration before the Supreme Court of Ohio and then review by

this Court. The October 18, 2001, trial court entry is void and should be ignored.

Respectfully submitted,

FAY D. DUPUIS
City Solictor

RICHARD GANULIN
Assistant City Solicitor
Counsel of Record

Room 214, City Hall
801 Plum Street
Cincinnati, Ohio 45202
(513) 352-3329
(513) 352-1515 FAX
richard.ganulin@rcc.org

Supreme Court, U.S.
FILED
APR 9 2002
CLERK

(4)

No. 01-1235

In The

Supreme Court of the United States

STATE OF OHIO,

Petitioner,

v.

GEORGE BURNETT,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Ohio

SUPPLEMENTAL BRIEF

FAY D. DUPUIS
City Solicitor

RICHARD GANULIN
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Counsel of Record

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2pp
f/o

SUPPLEMENTAL BRIEF

Attached is the order dated 4/9/02 of the Hamilton County Municipal Court vacating the order of that court dated 10/18/01 that is attached to the Respondent's Brief in Opposition. The order dated 10/18/01 had been erroneously issued at a time the Hamilton County Municipal Court did not have jurisdiction over this matter.

Respectfully submitted,

FAY D. DUPUIS
City Solicitor

RICHARD GANULIN
Assistant City Solicitor
Counsel of Record

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HAMILTON COUNTY MUNICIPAL COURT
JOURNAL ENTRY - MITTIMUS

CASE: 98CRB23819
DEFENDANT: Burnett / George
CTLNO: 420795 TICKET:
SEC. VIOL: 2911.21A1
CHARGE: Trespass

JUDGE: Stockdale
PROB. VIOL: _____

ARREST DATE:
JMS_NUMBER:
SEX: D.O.B.
DEF. COUNSEL:
PROS. WIT:

CLERK'S USE ONLY		
INITIALS:		
PAYMENT DATE:	RECEIPT NO:	
FINE:	COSTS:	CONCAR:
WIT FEES:	JURY FEES:	P.D. FEES
LIP FEE:	BMV FEE:	TOTAL PAID

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DATE	ACTION	SIGNATURE OF JUDGE
	Arraignment - Probable cause to hold demonstrated ( )YES ( )NO THE BOND SHALL BE $ MAY BE AT 10% ____ ____ ____ /98/CRB/23819 BURNET/GEORGE MO DELL COURT DATE:04/09/02 AT 9:00 AM IN ROOM 174 COURTHOUSE	Dem
4-9-02	Order of 10-18-01 vacating plea and sentence and dismissing charge is set aside. Cont for report to 6-5-02 9:00.	

Burnett Deputy Clerk 4-9-02

BEST AVAILABLE COPY

App. 1